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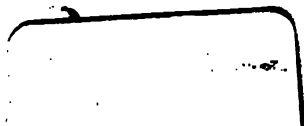
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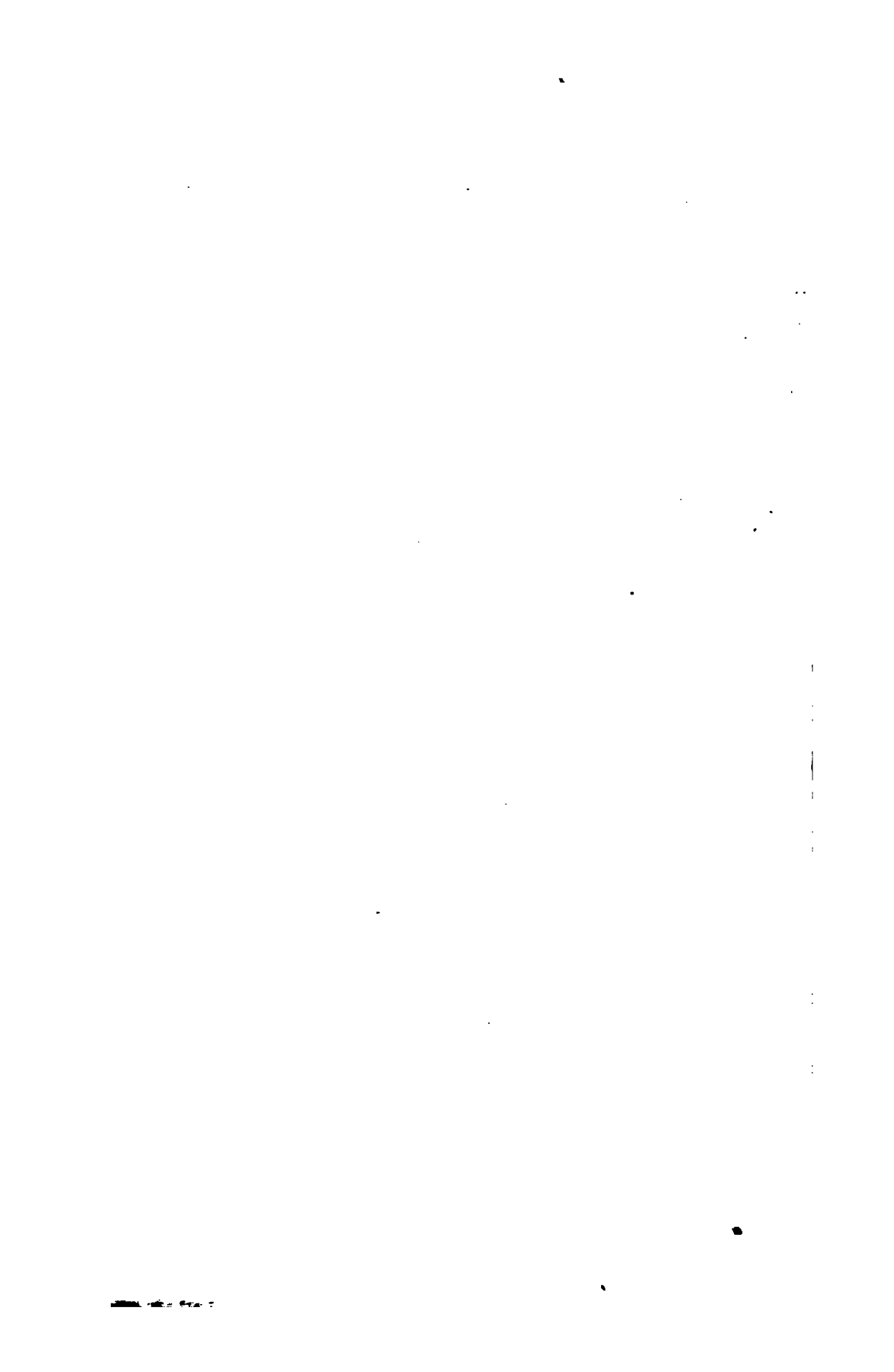
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R E P O R T S O F C A S E S

IN

CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND.

EDITED BY

EDWARD W. COX, Esq., OF THE MIDDLE TEMPLE,

~~Barrister-at-Law.~~

VOL. IX.

1861 to 1864.

LONDON :

HORACE COX, "LAW TIMES" OFFICE, 10, WELLINGTON STREET,
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REPORTS
OF
Criminal Law Cases.

CENTRAL CRIMINAL COURT.

May 8th, 1861.

(Before THOMAS CHAMBERS, Esq., Q.C., Common Serjeant.)

REG. v. CHATER. (a)

Embezzlement—Master and servant.

The prisoner was indicted for embezzling moneys received by him by virtue of his employment as clerk to North and others his masters. It is for the jury to say if the relation of master and clerk existed between the prosecutor and prisoner.

THE prisoner was indicted for embezzling the sums of 43*l.* 1*s.*, 110*l.* 11*s.*, and 79*l.* 5*s.* 10*d.*, received by him by virtue of his employment as clerk to North, Graham, and others.

Giffard and Poland for the prosecution.

Ballantine (Serjt.) and *Metcalf* for the prisoner.

The prosecutors are wholesale grocers, and the prisoner was employed by them under an agreement in these words:

“Messrs. North, Simpson, and Graham.

“Gentlemen,—I undertake to do business with you in Birmingham and other towns, for a commission, of half per cent. on the amount of invoices, and if at any time I make a bad debt, I agree that the commission on this account for twelve months back, or from the time of dealing, if for a short period, shall be deducted

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

REG.
v.
CHATER.

1861.

Embezzlement

from my first settlement afterwards; commission to cover all expenses.

"23rd February, 1846."

"EDWARD CHATER."

Alexander Graham, one of the firm, being examined, produced the above agreement and said, "the prisoner sent up every week a list of the receipts made up to the Friday, that he was in the habit of describing him as agent, and sometimes as traveller, as appeared by letters (produced). The course of business was, that the prisoner was paid a commission on the orders taken by him, a bill was sent to the customer with the goods, and when due, the name of customer and amount was sent to the agent at Birmingham (prisoner). Nothing was paid him as commission on the amounts collected. Lists of accounts for collection were sent him, independent of those due for the orders he had obtained, and he received no commission for that work; it was not optional with him; he was bound under the agreement to collect what we asked him; all our debts within his district, that was the nature of his business. I consider the nature of the business of a person employed by us, as an agent in the country, is to collect all our debts, and to get what orders he pleases, and on those orders receive a commission."

Ballantine (Serjt.) (To the Court).—This evidence does not establish the relation of master and servant. The prisoner was an agent, and, although it may be a difficult matter sometimes to distinguish the relationship, there is in reality a wide difference. This evidence clearly shows the relation of principal and agent. The manner in which, and the place when, he was to perform his business, was left to his own discretion. He is in exactly the same position as an agent to an insurance company. No doubt a person might be a servant, and authorised to exercise a discretion in certain matters, but here discretion is not liable to be interfered with authoritatively by the employers, it is absolute. In *Reg. v. Tite*, (Cox Crim. Cas. 458), the prisoner was a commercial traveller, under the control of his employers, and bound to go here and there, and do this and that, according to orders.

Metcalfe (with *Ballantine*, Serjt.).—The prisoner here works under an agreement, which agreement simply amounts to an undertaking to do business on commission, the prisoner being liable for bad debts.

Giffard (*Poland* with him) for the prosecution.—If the agreement be clear and definite, of course it must be binding; but if it be ambiguous in its terms, as this agreement is, you must ascertain from the facts of the case the relation that exists. Here it has been shown that the prisoner travels, collects money, and transmits it to his employers. I do not see how this is to be distinguished from the case of a commercial traveller. Making him liable for bad debts does not show he is not a servant.

THE COMMON SERJEANT.—I must be satisfied that there was something between the parties which invested the one with the character of master, and imposed upon the other the duties of a

servant. Explain what obligation was imposed upon the prisoner in the capacity of servant.

Giffard.—He was employed to collect moneys due upon accounts, with which he had no connection, and upon which he received no commission; that was by virtue of his general engagement.

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v.
CHATER.
1861.

Embezzlement.

The COMMON SERJEANT.—You say that the services rendered by him may be used for the purpose of interpreting the agreement, and seek to show that some other relation existed between the parties than appears upon the agreement.

Poland followed on the same side.

Ballantine (Serjt.) in reply said, "Any work extra the agreement was voluntary, and not by virtue of his employment."

The COMMON SERJEANT having consulted Mr. Justice Willes, said, "His Lordship agrees with me in thinking the case should go to the jury, and it is for them to decide whether, upon the facts given in evidence, the prisoner was acting in the capacity of clerk or servant to the prosecutor, or merely as their agent."

Not guilty.

Other indictments against the prisoner were not proceeded with.

See also *Reg. v. May*, 8 Cox, Crim. Cas. p. 421.

CENTRAL CRIMINAL COURT.

August 23rd, 1861.

(Before Mr. Justice BLACKBURN.)

REG. v. DE VIDIL. (a)

Deposition of witness too ill to travel—Deposition taken before county magistrates in Middlesex—Prisoner committed by p. magistrate at Bow-street.

A deposition taken by virtue of 11 & 12 Vict. c. 42, s. 17, may be in evidence against the prisoner, although taken before two magists who acted only upon that occasion, and the prisoner was afterwards committed for trial by another magistrate.

THE prisoner was indicted for unlawfully, maliciously, feloniously cutting and wounding Alfred John de V with intent to murder him. There were other counts in the indictment.

Clerk and Beasley for the prosecution.

Ballantine (Serjt.) (Sleigh and Orridge with him) for the prisoner.

A witness for the prosecution named Rivers, being proved to be too ill to travel, it was proposed to read his deposition.

William Dyott Burnaby being examined, said, I am chief clerk at Bow-street. On the 16th July I went down to Twickenham in consequence of the illness of the witness Rivers. The prisoner was then in custody. The charge against him was for unlawfully, maliciously, and feloniously cutting and wounding one Alfred John de Vidil, with intent to murder him.

Ballantine (Serjt.).—Was the charge made before the magistrate at Bow-street?

Witness.—It was, and in consequence of the illness of the witness Rivers, the prisoner was taken down to Twickenham, and deposition was taken before two of the county magistrates, in the presence and hearing of the prisoner, and signed by them. Subsequently, upon a further investigation at Bow-street, the prisoner was committed by Mr. Corrie. The magistrates at Twickenham

were Mr. Donnythorne and Mr. Murray. The prisoner was attended by his solicitor, Mr. Wontner, and his counsel, Mr. Leigh.

Ballantine, (Serjt.)—I object to this deposition being read. The 11 & 12 Vict., c. 42, s. 17 enacts, that in all cases when any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, &c., before he or they shall commit such accused person to prison for trial, shall, in the presence, &c., take the statement on oath, &c., and shall put the same into writing; and such deposition, &c., shall be signed by the justice or justices taking the same. The meaning of this is, that the deposition shall be taken by the magistrate before whom the charge is made, and by whom the prisoner is committed, and returned by him. In this case there is the intervention of other magistrates for the purpose of taking this single deposition, those magistrates not being the magistrates before whom the charge was made, or by whom the prisoner was committed.

Leigh (with *Ballantine*, Serjt.)—From the wording of the 17th and 18th sections of the Act, the whole proceedings should be before the same magistrate. The 18th section enacts, that the justice or justices before whom such examination shall have been completed shall caution the accused in terms before committing him for trial.

BLACKBURN, J. (without calling upon the other side).—I am of opinion that it was not intended, by the two sections referred to, to confine the admissibility of a deposition to the case of a person examined before the magistrate before whom the charge is made, and who commits the prisoner for trial. The meaning of the provision in the Act is this, that when a witness may be in a distant part, and too ill to travel, the magistrate or magistrates acting for that locality may take the examination, of course in the presence of the accused, and with the formalities enjoined, and return it to the proper quarter. Here the deposition was read over to and signed by the witness, and signed also by the justices taking the same. It was taken in the presence of the prisoner, and he had full opportunity of cross-examining. It seems to me, all that is necessary has been complied with, and I shall allow the deposition to be read.

REG.
v.
DE VIDIL.

1861

Practice—
Deposition.

Guilty.

CENTRAL CRIMINAL COURT.

September 27th, 1861.

(Before Mr. Justice BYLES.)

REG. v. MALONEY.(a)

Murder—Finding of jury.

Indictment for murder. Defence that deceased committed suicide. Verdict "guilty," the jury adding that they believed the act was committed without premeditation. The judge refused to receive such a verdict, and directed the jury to say guilty or not guilty.

THE prisoner was indicted for the wilful murder of Mary Maloney, his wife. He was also charged with wilful murder upon the Coroner's inquisition.

John Clerk and Orridge for the prosecution.

Sleigh, for the prisoner.

The deceased, Mary Maloney, was the wife of the prisoner, and it appeared by the evidence that, on Monday, the 2nd of September, the prisoner came home to dinner, and nothing occurred to excite the suspicions of the neighbours till he was found outside the door of his house looking very pale, and with blood upon his right hand and the sleeve of his smock. He said to a woman, "Mary has done it at last; she has killed herself." And upon search being made, she was found lying near a table, quite dead, with a deep punctured wound upon the shoulder, dividing the sub-clavian artery. It was a clean cut wound, and the knife with which it was made had penetrated to the cavity of the chest. It was proved that the deceased had been conversing cheerfully a few minutes before this happened with some persons in the neighbourhood, and that she was quite sober. No suggestion was made that any quarrel had taken place, but a witness was called who swore that he was looking for lodgings that morning, that he opened the room door where Maloney and his wife were, that they were at the table, and that he saw the deceased leaning forward and the prisoner stab her in the shoulder.

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

The prisoner adhered to his original statement throughout, viz., that she had killed herself, and this was the defence urged by his counsel.

The jury found the prisoner guilty of murder, adding, "but we believe it was done without premeditation."

Sligh.—That is a verdict of manslaughter.

BYLES, J.—I cannot take that verdict, you must say guilty or not guilty. You are not asked to say if it were premeditated or not. If the prisoner killed the woman he is guilty of murder.

The foreman of the jury (after consulting his brother jurors.)—Can we find the prisoner guilty of manslaughter?

BYLES, J.—No; and I see nothing that can justify you in desiring to find such a verdict.

The jury again retired, and in a few minutes were sent for into court by his Lordship, who said he had sent for them to tell them that, although it was their province to deal with the facts of the case, it was his duty to tell them the law, and they were to take that from him. To reduce the crime to manslaughter, it must be shown there was provocation at the time, and provocation of a serious nature. The prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes the malice. And, although that may be rebutted by evidence, no such attempt has been made here. The defence is, that the woman took her own life. The question for you is, did the prisoner take his wife's life or not? If he did, it was murder. You must say guilty or not guilty.

The jury then said guilty, but recommended the prisoner to mercy, on the ground that there was no evidence of the act being premeditated.

BYLES, J.—I will take care, gentlemen, that your recommendation be forwarded to the proper quarter. (b)

Sentenced to death.

(b) The sentence was afterwards respited, in consequence of the recommendation to mercy by the jury.

REG.
v.
MALONEY.
1861.
Murder—
Verdict.

CENTRAL CRIMINAL COURT.

October 3rd, 1861.

(Before the RECORDER OF LONDON.)

REG. v. COELHO. (a)

Forgery—Guarantee—No consideration.

Prisoner was indicted under 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, for forging a guarantee. Such a document is the subject of forgery though no consideration appear. The 19 & 20 Vict. c. 97, s. 3, give validity to such an undertaking.

THE prisoner was indicted for feloniously forging and uttering an undertaking for the payment of money, to wit, 300*l.*, with intent to defraud.

Metcalfe (*Hensman* with him), for the prosecution.

Hardinge Giffard for the prisoner.

The instrument, the subject of the charge, was in the following terms:—

“ St. Helier’s, Jersey,

“ 23rd Sept. 1861.

“ Messrs. Crawford, Lindsay, and Faithfull,

“ 3, Lawrence Lane,

“ London.

“ Gentlemen,

“ I hereby guarantee to you the payment in full of the following promissory notes of Mr. José.

“ His promissory note to you for 50*l.* due 30 March 1862.

“	“	“	“	Sept.	“
“	“	“	30	March	1863.
“	“	150 <i>l.</i>	“	Sept.	“

“ In all 300*l.*

“ I am, Gentlemen,

“ Yours truly,

“ WM. FRODSHAM.”

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

At the close of the case for the prosecution—

Giffard contended, "the instrument, the subject of this indictment, is not an undertaking for the payment of money within the statute. The 4 Geo. 4 & 1 Will. 4, c. 66, s. 3, is the Act under which the indictment is framed, and it was never intended to apply to any idle document that a person may choose to put forth. Here is a bare undertaking to pay certain moneys, of no value in point of law because no consideration appears. If it were a genuine document it would be of no use by the Statute of Frauds."

Metcalfe, referred to *Reg. v. Reid* (2 Moody, C.C. 62).

Giffard.—There the consideration is expressed. Here there is nothing to indicate any consideration.

Metcalfe.—The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, in the 3rd section, declares that "no special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." This undertaking was made since the passing of this act, and is good at law.

Giffard.—My argument goes to the state of the law at the time of the passing the act of 1 Will. 4. That act contemplated an undertaking that should be binding at the time of the passing of that act.

The RECORDER.—No; it contemplates a document that should be binding. The 19 & 20 Vict. c. 97 makes this undertaking a valid one, and I think it is properly the subject of this indictment.

Guilty.

REG.
v.
COELHO.
1861.
Forgery.

COURT OF CRIMINAL APPEAL.

Saturday, November 9, 1861.(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
and MARTIN and CHANNELL, BB.)

REG. v. DONALD M'DONALD. (a)

Embezzlement—Servant or partner—Share of profits.

Previous to 1855 the prisoner was in the prosecutor's service as cashier and collector, and another person, W., as salesman. In that year the prisoner and W. applied each for an increase of salary, and in the end the prosecutors agreed to allow each of them 12½ per cent. on the profits, in addition to their salaries, and if there was no profit in any year, neither the prisoner nor W. were to contribute anything towards the loss, but were to receive their salaries only. The prisoner and W. from time to time, instead of receiving their shares of profits at the end of the year, allowed portions of them to remain in the hands of the prosecutors at 7 per cent. :

Held, that the prisoner was a servant of the prosecutors, liable to be convicted of embezzlement, within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47.

CASE reserved for the opinion of this Court by the Recorder of the borough of Manchester.

At the quarter sessions for the city of Manchester, holden before me, on Monday, the 24th June, 1861, Donald M'Donald was tried and convicted on an indictment for embezzling three several sums of 663*l.* 3*s.*, 449*l.* 5*s.* 6*d.*, and 182*l.* 6*s.*, the property of Joshua Lord and another, his masters.

The prosecutors, Joshua Lord and Richard Smith, carried on business as manufacturers at Bacup, under the style of James Smith and Sons, but there were no other partners than the two above named; they also carried on business in Birchin-lane, Manchester, as commission agents in cotton, cloth and yarn. At their establishment in Birchin-lane they sold their own goods manufactured at Bacup, and other persons also consigned goods to them to sell, and they themselves bought goods to sell again there.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The prisoner was in their service in the Manchester business as cashier and collector, and a person of the name of Edward Williamson was their salesman.

In 1855, the prisoner and Williamson having held their respective situations in the service of the prosecutors for about seven years, applied to have their salaries, which were 150*l.* a-year each, increased. This was not at once acceded to, but in the end the prosecutors agreed to allow the prisoner and Williamson each 12½ per cent. on the profits, in addition to their salaries; and it was stipulated that if the concern should be a losing one in any year, neither the prisoner nor Williamson were to contribute anything towards the loss, but that in that event they would have to be content with their salaries.

None of these parties intended to alter, nor up to the time of the prisoner's apprehension on this charge, did any of them suppose that they had altered by this arrangement the relation of master and servant, which had previously existed between the prosecutors and the prisoner and Williamson.

After this arrangement the prisoner and Williamson continued to discharge the same duties, and to hold the same positions they had respectively done before, and neither of them had any control over the management of the business.

Amongst the payments which the prisoner as such cashier had to make, were the wages and salaries of servants (the weekly payments were called wages, monthly payments salaries), and in his account he credited himself every month with the payment of his own salary amongst the rest, as he had done before.

At the end of the first year after the arrangement, prosecutors proposed to prisoner and Williamson to leave with them a portion of the profits they had then to receive, and that the prosecutors would allow them 7 per cent. upon it. This was as an inducement to them to save their money, but they both then declined doing so at that time. At the end of the next year, they each left 70*l.* with the prosecutors, they agreeing to pay them 7 per cent. for it, the men being at liberty to draw it out at any time if they thought they could lay it out to more advantage. It was afterwards increased, and at the time of this trial the prisoner and Williamson had each 120*l.* in the hands of the prosecutors, for which they were entitled to receive 7 per cent. as long as it remained there. Seven per cent. was the interest with which the prosecutors debited the concern on the capital employed by them in it.

There never was in any one year an actual loss to the concern. But in 1860 a great many bad debts were made; and at the stock-taking at the end of that year the profits were very trifling indeed; and the prosecutors, in consideration of that, made to each of their men, the prisoner and Williamson, a present in addition to their salaries.

On these facts the Jury were of opinion that the prisoner was a servant within the meaning of the statute, and found him guilty,

REG.
v.
DONALD
M'DONALD.
—
1861.

*Embezzlement
—Servant or
partner.*

REG.
v.
DONALD
M'DONALD.
—
1861.
—

Embezzlement
—*Servant or*
partner.

and I sentenced him to be imprisoned and kept to hard labour in the gaol of the city of Manchester for eighteen months.

The question for the opinion of the Court is, whether the jury were warranted, on the above-stated facts, in finding that the prisoner was a servant within the meaning of the statute.

If the Court should be of opinion that they were, the verdict and sentence to stand; if otherwise, both to be set aside.

RO. B. ARMSTRONG, Recorder of Manchester.

No counsel appeared for the prisoner.

Hopwood for the prosecution, referred to *Harrington v. Churchward* (29 L. J. Ch. 521), where it was held that C. having contracted with the Government for the conveyance of mails by sea, agreed with H. to employ him as superintendent of the engineering department during the existence of the contract, at a fixed salary payable quarterly, and in addition thereto, a sum equivalent to 10% per cent. on the profits, this was a contract of hiring and service, and not a partnership.

By the COURT.—The prisoner was not a partner with the prosecutors, and was properly convicted.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

Saturday, November 9, 1861.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.
MARTIN and CHANNELL, BB.)

REG. v. WILLIAM WEBSTER. (a)

*Friendly society—Larceny by member—Ownership of property—
Trustees—Bailee.*

H., a member of a friendly society, was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, and was subject to the loss arising from the shop. H. had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of the management. The prisoner, also a member of the society, assisted in the shop without salary, and was indicted for stealing some marked money which H. had placed in the till. The money was laid in the indictment as belonging to H.:

Held, that the money was properly laid in the indictment as belonging to H., and that the prisoner, although a member of the society, could be convicted of larceny.

CASE reserved for the opinion of this Court by the Chairman of the West Riding Sessions, held at Sheffield.

William Webster was indicted at the West Riding of Yorkshire Spring intermediate sessions, held at Sheffield, on the 22nd May, 1861, for stealing, on the 11th of May, at Ecclesfield, three sovereigns and one half sovereign, the property of Samuel Fox and others.

It was proved on the trial that James Holt was in possession of a shop, where goods were sold for the benefit of a society called the "Stockbridge Band of Hope Co-operative Industrial Society."

Each member of the society partook of the profit, and was subject to the loss arising from the shop. Holt (being himself a member) had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management. The prisoner, also a member of the society, assisted in the shop without salary.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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v.
WILLIAM
WEBSTER.
—
1861.
—

*Larceny by a
member from a
friendly society.*

On the occasion of the alleged larceny, Holt had marked some sovereigns and half-sovereigns, and placed them in the till. The prisoner was suspected of taking some of them, and when charged with this, he admitted that he had taken the coins which formed the subject of this charge, and produced them from his pocket.

The prosecution failing to prove that this was a friendly society duly enrolled, elected to amend the indictment by substituting the name of James Holt for that of Samuel Fox and others, and the same was amended accordingly.

The counsel for the prisoner put in a copy of the rules of the society, with the name of John Tidd Pratt printed at the end thereof, and proved that this copy had been examined with the original copy, signed and sealed by the registrar of friendly societies, but which was not produced. He also put in a conveyance of the shop and premises to Samuel Fox and others as trustees.

No other evidence of the trusteeship was given.

The counsel for the prosecution objected that in order to prove the society to be a friendly society under the 18 & 19 Vict. c. 63, it was necessary to produce the original copy signed by the registrar, or to account for its absence sufficiently to justify the admission of secondary evidence.

I overruled this objection, and admitted this evidence as proof that the society was duly enrolled.

It was contended for the prisoner that Fox and others were the trustees; that this was a friendly society, and that the property should be laid in Fox and others, and not in Holt, and that the prisoner could not therefore be convicted on the indictment as amended; that as to any special property Holt might have in the money taken, he was joint owner of it with the prisoner, and as partner with him was equally in possession of it, and could not therefore be convicted.

The Court overruled these last-mentioned objections, and the prisoner was convicted and sentenced to be imprisoned in the house of correction at Wakefield for nine calendar months, subject to the opinion of the Court of Criminal Appeal whether under the circumstances the conviction was right.

The prisoner was admitted to bail to await the decision of the Court of Criminal Appeal.

A copy of the rules of the society accompanies this case, and is to be taken as incorporated therewith.

WILSON OVEREND, Chairman.

T. Campbell Foster, for the prisoner.—It is contended that the indictment as amended was not proved, and that the property ought to have been laid as in Fox and others, the trustees of the friendly society. The prosecutor having failed to prove that the property was rightly laid in Fox and others, and the Court having amended the indictment by substituting Holt's name instead of Fox and others, the prisoner produced the proper evidence to show that Fox and others were the trustees of the society, and then

objected to the indictment as amended, on the ground that by the 18 & 19 Vict. c. 63, s. 18, the property of the friendly society was vested in the trustees. Sect. 19 empowers the trustees to bring or defend, or cause to be brought or defended, any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right or claim to property of the society, "and such trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded in their proper names as trustees of such society without other description."

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v.
WILLIAM
WEBSTER.
—
1861.

*Larceny by a
member from a
friendly society.*

MARTIN, B.—What evidence was there to show that Holt was not in possession of these sovereigns as of his own lawful property?

WIGHTMAN, J.—Again, he was a partner, and had the personal possession of these moneys.

T. Campbell Foster.—It is submitted that the only possession Holt had, was that of a servant to the friendly society. If he had taken and appropriated any of the moneys received by him, he might have been indicted for embezzlement, and therefore he was a servant, and his possession was that of the society his masters.

WIGHTMAN, J.—He was not a servant; he was an owner, and had the sovereigns in his personal possession.

MARTIN, B.—He had the sole management of the shop, and was answerable for the safety of all the property and money coming to his possession in the course of such management.

T. Campbell Foster.—Then the prisoner being also a member of the society, was a partner, and could not be convicted of stealing his own property.

WILLIAMS, J.—There is the well-known case of a man, when the hundred was liable, being convicted of stealing his own money from his own servant: (*Foster*, 123, 124.)

WIGHTMAN, J.—These sovereigns were not part of the goods in the shop, but money for which Holt had to account. He cannot be treated as a servant, because it would then follow that he was one of the persons appointing himself.

MARTIN, B.—Holt had got the sovereigns in his own pocket, as it were, and suppose that while walking in the street some one had picked his pocket of them, could not the thief have been indicted for stealing his money?

T. Campbell Foster.—The prisoner was assisting in the shop as a partner without salary.

WIGHTMAN, J.—No. Holt had the sole management of the shop.

WILLIAMS, J.—How does this case differ from *Reg. v. Bramley*, R. & R. 478, where a member of a benefit society entered the room of a person with whom a box containing the funds of the society was deposited, and took and carried it away, and it was held to be larceny, and the property to be well laid in the bailee?

POLLOCK, C. B.—No doubt a man who has pawned his watch with a pawnbroker may be indicted for stealing it from the pawnbroker. The present case finds that Holt was in possession of the

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v.
WILLIAM
WEBSTER.
—
1861.

shop, and had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management, and therefore he may, *quoad hoc*, be treated as the owner.

By the COURT,

Conviction affirmed.

*Larceny by a
member from a
friendly society.*

COURT OF CRIMINAL APPEAL.

Saturday, November 16, 1861.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and KEATING, J.)

REG. v. THOMAS MOSELEY. (a)

False pretences—Evidence—Person from whom property obtained.

The indictment charged the prisoner with obtaining the sum of 5s. 6d., the moneys of G. B., by false pretences from G. B. It was proved that the prisoner falsely pretending to be an agent for a loan society, and that he could procure a loan from it for G. B., claimed 5s. 6d. for his charge, G. B. sent him to his wife for it, and she gave the prisoner 5s. 6d. of her husband's money:

Held, that the evidence supported the allegation in the indictment that the prisoner obtained the money from G. B.

CASE reserved for the opinion of this Court by the Chairman of the quarter sessions for the county of Chester.

The prisoner was tried and convicted at the last July quarter sessions for the county of Chester, on a charge for obtaining money by false pretences.

The indictment charged that the prisoner Thomas Moseley unlawfully and knowingly did falsely pretend to George Birtles that he, the said Thomas Moseley, was an agent for a loan society in Manchester, and would get the sum of 10*l.* (meaning the loan of 10*l.*) for the said George Birtles, but he, the said George Birtles, must pay him, the said Thomas Moseley, the sum of 5*s.* 6*d.*, by means of which said false pretences the said Thomas Moseley then unlawfully did obtain from the said George Birtles certain money, to wit, the sum of 5*s.* 6*d.* of the moneys, goods and chattels of the said George Birtles, with intent thereby then to defraud.

(a) Reported by JOHN THOMPSON Esq., Barrister-at-Law.

It appeared from the evidence that the prosecutor wanted to borrow 10*l.* to purchase the discharge of his son, who was in the army. The prisoner came to him and said he could get 10*l.* for him, and that he was an agent of a loan society in Manchester. Prisoner said that the charge would be 5*s.* 6*d.*, and the prosecutor told him to go to his wife for it. The prisoner went to prosecutor's wife and said he came for 5*s.* 6*d.*, as the man from the loan office was waiting for the money. The wife gave the prisoner 5*s.* 6*d.* of her husband's money.

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v.
THOMAS
MOSELEY.
—
1861.

False pretences
—*Ownership of*
property.

Evidence was given to negative prisoner being an agent to any loan society in Manchester. The prisoner did not get the loan for prosecutor.

It was objected by the prisoner's counsel that the indictment was not supported by the evidence, for that the prisoner did not obtain the 5*s.* 6*d.* from the prosecutor as laid in the indictment, but from the prosecutor's wife.

I reserved this objection for the decision of this Court.

The Jury found the prisoner guilty, and thereupon I postponed the sentence, but the prisoner being unable to find the bail required, he was committed to prison.

The question which I respectfully submit for the decision of the Court therefore is, whether the indictment is supported by the evidence?

LEE P. TOWNSEND,
Chairman Quarter Sessions, County of Chester.

No counsel appeared to argue on either side.

By the Court,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

Saturday, November 16, 1861.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B. and KEATING, J.)

REG. v. ANN CHARLES. (a)

*Disorderly house—25 Geo. 2, c. 36, s. 5—Prosecuting keeper of—
Jurisdiction of borough sessions.*

The 25 Geo. 2, c. 36, s. 5, directs the parish constable, on receiving due notice from two inhabitants, of any person keeping a bawdy-house or other disorderly house, and upon their making oath before a justice as to the truth of the notice, and undertaking to give material evidence against such person, to enter into a recognizance to prosecute with effect such person at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county:

Held, that a borough sessions in the county had jurisdiction under this enactment.

CASE stated by the Recorder of Grantham for the opinion of the Judges of the Court of Criminal Appeal.

Ann Charles was indicted at the quarter sessions for this borough, held on the 9th July last, for keeping a disorderly house.

The prosecution had been instituted under sect. 5 of 25 Geo. 2, c. 36, which enacts that "if any two inhabitants of any parish or place, paying scot, &c., therein, do give notice in writing to any constable (or other peace-officer of the like nature, where there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such officer as aforesaid so receiving such notice shall forthwith go with such inhabitants to one of her Majesty's justices of the peace of the county, city, riding, division, or liberty, in which such parish or place does lie, and shall (upon such inhabitants making oath that they do believe that the contents of such notice are true, and entering into recognizances, &c., to give or produce material

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

evidence against such person for such offence) enter into a recognizance in the penal sum of 30*l.* to prosecute with effect such person at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie, as to the said justices shall seem meet."

These provisions of the Act of Parliament had been duly complied with.

On the defendant being called upon to plead, it was objected, on her behalf, to the jurisdiction of the court, that the words, "at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie," meant only "at the quarter sessions or assizes for the county," and that they must be held to exclude the jurisdiction of the borough quarter sessions.

The Recorder overruled the objection.

The defendant thereupon pleaded "Not guilty."

The jury found the defendant guilty.

The defendant remains in gaol for want of bail.

Should the judges be of opinion that the clause above cited does, by implication or otherwise, take away the jurisdiction of the borough sessions to try the offence in question, the judgment will be arrested and the prisoner discharged. Should the Court be of opinion that the Recorder was right in overruling the objection, then sentence will be passed at the next quarter sessions for the borough.

W. H. ROBERTS,

Recorder of the Borough of Grantham.

No counsel appeared to argue on either side.

By the Court,

Conviction affirmed.

REG.
v.
ANN CHARLES.
—
1861.
—
*Disorderly
house—Prose-
cution of keeper.*

COURT OF CRIMINAL APPEAL.

Saturday, November 16, 1861.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B. and KEATING, J.)

REG. v. HENRY WILKINS.

Administering a noxious drug—Cantharides—Intent.

The prisoner, unknown to the prosecutrix, put cantharides into her tea with the intent, as found by the jury, to excite her sexual passion and desire, in order that he might have connection with her. She drank the tea, and suffered much pain and was very ill in consequence:

Held, that the prisoner might properly be convicted of a misdemeanor under the 23 Vict. c. 8, s. 2, which enacts that "whosoever shall unlawfully and maliciously administer to, or cause to be administered to, or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person shall be guilty of a misdemeanor."

CASE reserved by Martin, B., at the Liverpool Summer Assizes 1861, for the opinion of this Court.

The indictment was tried before me at the last Liverpool Assizes.

The prisoner lodged with the prosecutrix, and, unknown to her put into a cup of tea which she was about to drink, a quantity of cantharides; she drank the contents of the cup and suffered much pain, and was very ill in consequence.

Cantharides taken internally in large quantities is poisonous but it is administered by medical men as a stimulant to the kidneys and bladder. It is also administered and taken to procure abortion, and to excite the sexual passion and desire.

The Jury found that the prisoner administered the cantharides to and caused it to be taken by the prosecutrix, with the intent to excite her sexual passion and desire, in order that he might obtain connection with her.

I postponed the judgment and offered to let the prisoner at liberty on bail, but I believe none was obtained, and that the prisoner is in custody.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

I request the opinion of the Court of Criminal Appeal, whether the intent above stated was an intent to injure, or to aggrieve, or to annoy, within the meaning of the statute 23 Vict. c. 8.

SAMUEL MARTIN.

The 23 Vict. c. 8 (an Act to amend the law relating to the unlawful administering of poison), s. 2, enacts, that "whosoever shall unlawfully and maliciously administer to, or cause to be administered to, or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be sentenced to imprisonment for any period not exceeding three years, with or without hard labour, at the discretion of the Court, and the costs and the expenses of the prosecution of any such misdemeanor may be allowed by the Court as in cases of felony."

REG.
v
HENRY
WILKINS.

1861.

*Administering
noxious drug—
Intent.*

No counsel appeared to argue on either side.

By the Court,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

Thursday, November 21, 1861.(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B. and KEATING, J.)

REG. v. WM. PROUD.(a)

*Embezzlement—Secretary of a friendly society—Felonious intent—
Evidence.*

Upon the trial of an indictment charging the prisoner with embezzling three distinct sums of money, it appeared that on investigation of the books of a friendly society, kept by the secretary (the prisoner), it was discovered that he had not entered in the books subscriptions received by him in small sums of 1s., 2s. and 3s. at a time, amounting to more than 100l. The prisoner, on being called upon for an explanation, admitted that he had received the money, and was willing to repay the amount, and said that the law could not touch him. The books of the society kept by the prisoner were tendered generally in evidence on the part of the prosecution, whereupon it was objected on behalf of the prisoner, that the evidence should have been confined to the three particular entries referring to the three charges in the indictment. It was further contended for the prisoner that it was a breach of trust only, and that the prisoner on these facts could not be convicted of embezzlement. The objections were overruled, and the jury found the prisoner guilty:

Held, that upon these facts the jury might properly convict.

CASE reserved for the opinion of this Court by the Chairman at a Court of quarter sessions, held at Hexham, Northumberland.

On the 3rd July, 1861, William Proud was charged, as appears by the indictment, with embezzlement, of which indictment the following is a copy:—

“Northumberland to wit.—The jurors for our Lady the Queen, upon their oath present, that William Proud, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty, being then employed as clerk and servant to William Civil, John Armstrong, and Francis Armstrong, did, by virtue of his said employment, then, and whilst he was so employed as aforesaid, receive and take into his possession certain

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

money to a large amount, to wit, to the amount of ninepence, for and in the name and on the account of the said William Civil, John Armstrong, and Francis Armstrong, his masters, and the said money then fraudulently and feloniously did embezzle, and so the jurors aforesaid, upon their oath aforesaid, do say that the said William Proud, in manner and form aforesaid, the said money, the property of the said William Civil, John Armstrong, and Francis Armstrong, his masters, from the said William Civil, John Armstrong, and Francis Armstrong, did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

"Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Proud afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the 1st day of September, in the year aforesaid, being then still employed as such clerk aforesaid by the said William Civil, John Armstrong, and Francis Armstrong, did, by virtue of such last-mentioned employment, then, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ninepence, for and in the name and on account of his said last-mentioned masters, and the said last-mentioned money then and within the said six calendar months aforesaid fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say that the said William Proud, in manner and form aforesaid, the said last-mentioned money, the property of his said masters, from the said William Civil, John Armstrong, and Francis Armstrong, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

"Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Proud afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the 1st day of September in the year aforesaid, being then still employed as such servant as aforesaid to the said William Civil, John Armstrong, and Francis Armstrong, did, by virtue of such last-mentioned employment, then, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ninepence, for and in the name and on account of the said William Civil, John Armstrong, and Francis Armstrong, and the said last-mentioned money then and within the said six calendar months last aforesaid fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say that the said William Proud, in manner and form aforesaid, the said money, the property of the said William Civil, John

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Armstrong, and Francis Armstrong, his masters, from the said William Civil, John Armstrong, and Francis Armstrong, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

The prisoner for fifteen years had been a member of and secretary to a properly certified friendly society at Hexham, the rules of which, as far as they are material to the present case, were as follows:—

"Appointment of Treasurer and Trustees.

"At the first meeting of this lodge after these rules are registered, there shall be elected by a majority of the members then present, three trustees and a treasurer, who shall continue in office during the pleasure of the lodge.

"Board of Management.

"That this lodge shall consist of an unlimited number of members. The business thereof shall be conducted by a board of management, consisting of the following, viz., Noble Grand, or N. G., Vice Grand, or V. G., Grand Master, or G. M., Secretary, Warden, right and left supporters to N. G. and V. G., guardian and treasurer; that five shall form a quorum, and the meetings shall be held every other Saturday, at eight in the evening, and continue open until ten, when it shall be closed for the evening; that every member of the lodge shall have an equal voice in all the property and concerns thereof; and when at any time or in any case the votes may be equal, the president at the time shall have the casting vote.

"Duty of Treasurer.

"The treasurer shall take charge of the funds of the lodge, and pay all demands when ordered to do so by the lodge, or by the N. G., V. G., and secretary for the time being. He shall balance his accounts at each auditing of the lodge books, or when required by the board of management, and supply the lodge officers with a duplicate thereof; he shall also give up all books, documents, moneys and property of the lodge in his possession when required so to do by a resolution of the lodge, and he shall, before taking upon himself the duties of his office, give security to the trustees, by himself and two bondsmen, pursuant to the Friendly Societies Act, 13 & 14 Vict. c. 115, s. 11, the amount to be determined on at a summoned meeting of the members, and bound to be in the form set forth at the end of the Friendly Societies Act.

"Duty of Secretary.

"He shall attend all meetings of the lodge, take minutes of the proceedings thereof, and keep a correct account of the receipts and expenditure of the lodge, prepare all summonses in due time, attend the auditors to point out and explain anything they may require respecting the accounts when required by the officers, or

a majority of the lodge. He shall prepare all documents for the district and board of directors, and make the annual and other returns to the registrar, as required by the Friendly Societies Act, 13 & 14 Vict. c. 115, and for his services he shall receive from the incidental expense funds of the lodge such sum as may be agreed upon on his acceptance of office."

The prisoner was appointed secretary by the society, and, as such, received a salary of 1*l.* per annum. No treasurer had ever been appointed, and the prisoner for the whole fifteen years had always at the weekly meetings of the society received all moneys due from the members, giving receipts for the same, and punctually made all payments due from the society, placing the balance in the society's box with the books at the lodge room. The prisoner always gave correct receipts to the members for their weekly payments, but made false entries in the contribution and cash-book kept by him as secretary.

In the course of last spring, suspicions having arisen, the prisoner was called upon to deliver up his books and the balance in hand; and it was then discovered, by comparing the receipts received by the members from the prisoner with the books kept by him, that he had not entered in the books a large number of subscriptions received by him in small sums of one, two, and three shillings at a time, amounting in the whole to more than 100*l.*

The prisoner was called upon for an explanation, and at once admitted he had received the money, and was willing to repay the amount by instalments, and said that the law could not touch him.

The counsel for the defence contended that it no doubt was a breach of trust, but that upon these facts the prisoner could not be convicted of embezzlement.

In the course of the case the books of the society, kept by the prisoner, were tendered generally in evidence by the prosecution; and, on behalf of the prisoner, it was objected that the evidence must be confined to the three particular entries referring to the three charges in the indictment.

The Court, however, overruled the objection, and left the case to the Jury, who found the prisoner guilty.

The Court thereupon passed sentence, but respited execution of the judgment on such conviction until the objection was considered and decided, and took a recognizance of bail from the prisoner to render himself in execution, pursuant to the statute 11 & 12 Vict. c. 78.

The opinion of the Court of Criminal Appeal is asked whether, on the above facts, the conviction can be sustained.

(Signed) THOS. ANDERSON,

Chairman of the said Court of Quarter Sessions.

No counsel appeared on behalf either of the prosecution or the prisoner.

By the Court,

Conviction affirmed.

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CENTRAL CRIMINAL COURT.

September 27th, 1861.

(Before Mr. Justice BYLES.)

REG. v. MALONEY. (a)

Evidence—Question asked as to what was said before the coroner.

A witness may be asked by prisoner's counsel as to what he said before coroner, without putting in the depositions.

WILLIAM MALONEY was indicted for the murder of Mary Maloney. He was also charged, upon the coroner's inquisition, with the like murder.

Clerk and Orridge, for the prosecution.

Sleigh, for the prisoner.

Joseph Saunders, a witness for the prosecution, being cross-examined as to whether he had not said, *before the coroner*, that he "told the woman at the eating-house that a murder had been committed;"

Clerk objected that what he said would appear by the depositions, and before such a question was answered they must be put in.

Sleigh contended that such a course was not necessary in regard to depositions taken before a coroner. They differed from depositions taken before a magistrate. Depositions taken by a coroner are taken under the 7 Geo. 4, c. 64, s. 4, repealing the 1 & 2 Phil. & Mary, c. 13, and by the 9 Geo. 4, c. 54. Depositions taken before a magistrate are taken under the 11 & 12 Vict. c. 42, and although the rule as to putting in depositions before a question be asked as to their contents applies to depositions taken under that statute, there is no such rule as to those taken under the statutes applying to coroners' depositions.

BYLES, J.—Unless some authority is shown me to the contrary, I shall allow the question to be put. The rules laid down by the Judges apply to examinations before a magistrate; examinations before a coroner are not mentioned, and this seems to me strongly

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

in favour of Mr. Sleigh's argument. If it had been intended that the same rules should apply to depositions taken before a coroner, they would have been mentioned. As I said before, unless an authority be shown me against such a question being put, I shall (in *favorem vitæ*) allow it to be put.

Guilty.

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CENTRAL CRIMINAL COURT.

Tuesday, 26th November, 1861.

(Before T. CHAMBERS, Esq., Q.C., Common Serjeant.)

REG. v. MONTRION. (a)

Practice—Previous conviction—Arraignment under 24 & 25 Vict. c. 99.

The prisoner was charged with uttering, &c., having been before convicted of felony. The old act provided that the previous conviction should be proved first at the trial; the 24 & 25 Vict. c. 99, directs that the prisoner shall not be arraigned upon the previous conviction till the subsequent felony shall have been disposed of. The 3rd section of the Repealing Act, 24 & 25 Vict. c. 95, considered as to proceedings at trial of offences committed before 1st November, 1861.

Held, by the Recorder and the Common Serjeant, that the 3rd section of the Repealing Act directs that the proceedings at the trial of offences committed before 1st November, 1861, shall be in accordance with the rules observed till that time.

DAVID MONTRION was indicted for feloniously uttering counterfeit coin on the 19th of October, he having been before convicted of felony.

Craufurd and W. H. Cooke, for the prosecution.

Ribton, for the prisoner.

The prisoner having been arraigned upon the old system, which allowed the previous conviction to be charged with the subsequent offence, and the counsel for the prosecution being about to prove the case according to the practice before the 24 & 25 Vict. c. 99 came into operation.

Ribton objected, first, that the arraignment should have been as directed by section 37 of that Act; and secondly, until that were done, no evidence of the previous conviction should be received.

Having reminded the Court of the practice under the old system, when a prisoner was indicted for a subsequent uttering

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

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after a previous conviction, he called the attention of the Court to the words of sect. 37 of the 24 & 25 Vict. c. 99, which are as follows: "Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act, committed subsequent to such conviction" (here follow directions as to preparation of indictment, fees, &c.), "the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say), the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the Court order the plea of not guilty to be entered on his behalf, the Jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted, as alleged in the indictment," &c. This provision was made to cure the great injustice which existed under the former Act, and although, before the 1st of November, the Acts of Parliament were in force as to the nature of the offence when the prisoner was brought to trial, the procedure at the trial was to follow the course laid down by the new Act.

IV. II. Cooke.—If that be so, how is the 3rd section of the Repealing Act (24 & 25 Vict. c. 95) to be construed? The words of that section are, that "Every offence which shall have been wholly or partly committed against any of the said Acts or parts of Acts, before this Act comes into operation, shall be dealt with, inquired of, tried, determined and punished, &c., in the same manner as if the said Acts and parts of Acts had not been repealed." The words here, "tried and determined," apply to such a proceeding as trial in Court, and mode of trial, and the section is expressly intended as a guide in the event of any such objection as this being made.

Ribton, in reply.—The above section applies to the nature of the offences committed, and the jurisdiction of the Courts under the Act that is repealed. The words, "it shall be tried, &c.," are only to give authority to the Court sitting after the acts are repealed. The practice and forms at those courts is defined and governed solely by the new Acts.

The COMMON SERJEANT.—It seems to me you are giving a very limited effect to the Repealing Act, but, as it is a matter of great importance, I will consult the Recorder.

The Common Serjeant having left the Court for that purpose, returned, and said the Recorder agreed with him in thinking the proceedings at the trial should be as formerly, where the offence was committed before the 24 & 25 Vict. c. 99, &c., came into operation.

NOTE.—In a case tried before Mr. Justice Byles next day, in the same court, the same question arose in an ordinary case of felony, and his Lordship said, "I am of opinion that as far as the offence

is concerned, the offence is governed by the former statute ; but as to the procedure at the trial, that is to be regulated by the Act which is in force *at the time of trial*. The two sections, s. 37 of 24 & 25 Vict. c. 99, and s. 3 of the Repealing Act, are difficult to reconcile ; but I am strong in my opinion."

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[NOTE.—At the winter assize, held at Norwich, December 9th, Baron Martin, we believe, agreed with the view taken by the Recorder and Common Serjeant.—REPORTER.]

COURT OF CRIMINAL APPEAL.

Saturday, November 16th, 1861.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
MARTIN and BRAMWELL, BB.)

REG. v. JANE ROBSON. (a)

Bailee—Larceny—Married woman—20 & 21 Vict. c. 54, s. 4.

The prisoner, a married woman, living with her husband, at the request of a lodger in her husband's house, took charge of his box containing, as the prisoner knew, money. She afterwards broke open the box, and stole the money. The husband had nothing to do with the transaction :

Held, upon a case reserved on an indictment containing counts against the prisoner as a bailee, and for larceny, that she was guilty upon either one or the other count.

CASE reserved by Martin, B., for the opinion of this Court. The indictment was tried before me at the last Durham assizes. It contained two counts : the first against the prisoner as bailee under the statute 20 & 21 Vict. c. 54, s. 4 ; the second, for larceny.

The prisoner was a married woman, living with her husband. They took in lodgers, but she exclusively attended to them, made the contracts with them and received the payments from them. Her husband did not in any way interfere in regard to them.

The prosecutor lodged with them ; he had in his bedroom a box in which he kept his clothes ; he kept in this box a smaller box, in which he had placed 45*l*. The smaller box was locked, and the key placed in a drawer within the larger one. He was about to

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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go to another part of the country to work, he thereupon locked up the larger box, gave the key to the prisoner, who knew that the smaller box containing the 45*l.* was within it, and requested her to take care of all, that is to say, the larger box and the smaller one, and the money for him, which she promised to do, and took the whole under her charge, and into her possession, so far as she could by law.

Her husband had nothing whatever to do with the transaction. During the prosecutor's absence, and whilst she was in possession and charge of the property as above mentioned, she fraudulently stole the money, and took and converted it to her own use. Her husband did not know of her doing so, and was innocent in the matter.

I postponed the judgment, and permitted her to be discharged upon her husband's recognizance for her appearance when called upon :

I request the opinion of the Court of Criminal Appeal :

First, whether the prisoner, under the circumstances above mentioned, was a bailee within the meaning of the statute 20 & 21 Vict. c. 54, s. 4 ? and,

Secondly, whether she was guilty of larceny ?

SAMUEL MARTIN.

T. Campbell Foster, for the prisoner.—This conviction cannot be sustained. First, as to the count against the prisoner as bailee. No doubt, if the husband had committed this offence, he would have been criminally liable under the Fraudulent Trustees Act as a bailee.

MARTIN, B.—This would have amounted to a breaking of bulk.

Foster.—I am now upon the count treating the prisoner as bailee, and I contend the prisoner could not be convicted upon it, as a bailment is founded on a contract, and a married woman is unable to enter into a contract. In point of law the husband was the bailee.

WIGHTMAN, J.—That can hardly be so. He knew nothing about the transaction, and he could not be made a bailee against his will.

MARTIN, B.—It is only necessary that a person should have the care of a chattel to make him a bailee ; a contract is not essential. There is a case where a master purchased a railway ticket for his servant travelling along with him, and it was held that the servant could sue for the loss of his own luggage, the action being founded on a breach of duty and not of contract : (*Marshall v. The York, Newcastle and Berwick Railway Company*, 11 C. B. 655.)

Foster.—At all events the box was in the possession of the husband, and a wife cannot be convicted of stealing the property of her husband.

WIGHTMAN, J.—She broke the box open.

Foster.—What she did is not punishable as against her husband,

who was the bailor. *Coggs v. Barnard*, 1 Smith L. C. 82, shows that there must be a contract to support a bailment.

MARTIN, B.—Can there not be a bailment by licence?

Foster.—I submit not.

WIGHTMAN, J.—If the husband, though a bailee, had broken bulk, would he not be liable? and if so, why is not the wife liable? Suppose a lodger had gone out, leaving a gold watch upon his dressing-table, and the wife, without the knowledge of her husband, had taken it, would she not be liable?

Foster.—I submit she could not be indicted.

MARTIN, B.—You fail in showing any contract with the husband at all. If an action were brought against him for the loss, he would be entitled to the verdict on *non assumpsit*.

Foster then referred to the cases of *Marshall v. Rutton*, 8 T. R. 545; and *Reg. v. Hassall*, 30 L. J. 175, M. C.; 8 Cox C. C. 491. Secondly, as to the count for larceny. A breaking of bulk assumes a bailment.

WIGHTMAN, J.—You can break bulk without a bailment.

WILLIAMS, J.—The reason why a carrier's wife cannot be guilty of stealing part of the things to be carried is because a bailee cannot be guilty of a trespass, but a stranger can, and if you add to the trespass a felonious intent, that will make it a larceny.

Foster.—In *Willis'* case, 1 Moo. C. C. 375, it was held, that the wife of a member of a friendly society who stole money belonging to the society out of a box in her husband's custody, under the lock of the stewards of the society, was not guilty of larceny. A bailee is a person with whom a specific thing is deposited, and who is bound to return it in specie.

Waddy for the prosecution.

POLLOCK, C.B.—It is enough to say that one of the questions left to us is, whether the prisoner was guilty of larceny under the circumstances. I think she was.

WIGHTMAN, J.—Either the prisoner was a bailee, and guilty on the first count of the indictment, or she was not a bailee, and then she was guilty of larceny on the second count.

MARTIN, B.—My impression is, that she was a bailee by licence, and that there need not be a specific contract of bailment to make a person a bailee within the meaning of the 20 & 21 Vict. c. 54, s. 4.

WILLIAMS, J. and CHANNELL B. concurred.

Conviction affirmed.

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woman.

COURT OF QUEEN'S BENCH.

Monday, May 27, 1861.(Before COCKBURN, C.J., CROMPTON, J., HILL, J. and
BLACKBURN, J.)

REG. v. BOYES. (a)

*Witness—Privilege on ground of tendency of answers to criminate—
Pardon—Liability to answer—Accomplice—Corroboration.*

On the trial of an information against the defendant for bribery at a parliamentary election, filed by the Attorney-General, in pursuance of a resolution of the House of Commons, a person, alleged in the indictment to have been bribed, was called as a witness; he refused to answer any question, on the ground that the answer would tend to criminate him. A pardon under the Great Seal was then handed to the witness, but he still refused to answer, upon which the judge compelled him to answer, and on his evidence the defendant was convicted: Held, that the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the Crown was concerned; and that, though the witness might still be liable to an impeachment by the House of Commons, notwithstanding the pardon, by reason of the 12 & 13 Will. 3, c. 2, yet that was so unlikely to happen that the witness could not be said to be in any real danger, and he was therefore rightly compelled to answer.

To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency.

INFORMATION filed by the Attorney-General against the defendant for bribery committed at the parliamentary election for the borough of Beverley, Yorkshire, in April 1859.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

The information contained eight counts, each charging a distinct act of bribery to different voters. The third count, upon which alone a verdict of guilty was found, charged the defendant with having given a bribe to a voter named John Pougher.

The trial took place at the Yorkshire Summer Assizes, 1860, before Martin, B., and the jury thought the evidence in support of all the other counts but the third insufficient. In support of the third count John Pougher, the voter bribed, was called as a witness, and the learned Judge considered it to be his duty to tell him that he was not bound to answer, if by answering he would criminate himself. The witness declined to answer the questions. Upon that the Solicitor-General put his hands into a blue bag which was lying before him, and produced a document, which he handed to the witness, and said, "There is your pardon." The witness looked at it and said, "What have I done to deserve a pardon?" The learned Judge, acting upon the authority of two cases which he had before him, and considering that he was justified in so acting, said, "I still tell you, if you object to answer the questions, you need not do so." The Solicitor-General contended that he could compel him to answer. Martin, B., said, "I do not like to do that; it is a very serious responsibility, because if I tell him so to do and he refuses, I shall send him to goal; and to act in so summary a way seems to me very undesirable; I cannot, I do not think I ought to do it. I believe that he is not compellable to answer, but I will consult Wilde, B." Having consulted Wilde, B., Martin, B. said that he entertained likewise a strong doubt, but under the circumstances he recommended him, and he should adopt that view, to compel the witness to answer. "If I am wrong, it must be perfectly understood again by the Solicitor-General, that the Court is to set me right, and if I am wrong in compelling this man to answer, the prosecution ought to drop."

Pougher then deposed, that he went to a room in a house in the borough, where the other witnesses went each upon different times, and that there they saw newspapers and other things. The defendant was in the room conversing with them, and they went from thence into another room, where a man gave them, as runners or watchers, or officers of that kind, 1*l.*, in some cases 2*l.*, and it was stated that the 1*l.* was for the service for so many days, and the 2*l.* if they were required for more days. That was the species of bribery that was proved in these cases. It was contended by the defendant's counsel, that there was no corroboration of the witness's evidence, and that he, being in the nature of an accomplice, the learned Judge ought to have directed the jury not to act upon his evidence alone, and to acquit the prisoner.

In the summing up, Martin, B., thus commented upon the evidence: "If that man's (Pougher) evidence was true, this was the very morning of the election, he went there and saw the defendant; he was desired to go into the room, and after saying, 'Now my man, is that thou?' and I said, 'of course it was;' he goes into a room, heard a voice saying 'two.' That is followed

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up by the two sovereigns being put into his hands. He immediately gets into a cab and goes and polls for Walters. Now you must ask yourselves whether you believe that the two sovereigns were given to the man for his vote, and whether you believe the defendant was concerned in the matter, and whether it was done with his authority as part of a transaction in which he was engaged. Assume, for the purpose of the present discussion, that this man was speaking the truth. Is there any law which prohibits a jury from believing a man who (it must be assumed for the sake of the argument) spoke the truth simply because he was not corroborated? I know of none. I know of no rule of law myself, but there is a rule of practice which has become hallowed as to be deserving of respect: I believe these are the very words of Lord Abinger, it deserves to have all the reverence of the law. This case is distinguishable from that cited by the counsel for the defendant, for they were there accessories proper so called, and all the persons were concerned in the same offence in which they came to give evidence against the man. In the particular case it is not so, because all of these cases are separate and gone into, and it is not one and the same offence; and if you think that all these witnesses have spoken the truth, then it is clear that each case is clear and separate; each person giving evidence is a distinct offence. I have endeavoured, as far as I can, to explain to you these matters that have occurred in this case. I own I think also that that is a very important point, and that it may be very doubtful whether or not the evidence in this case will be found to be of that corroborative character which the law requires."

The only witnesses called in support of the several counts of the information, were the voters alleged to have been bribed, each of whom deposed to a separate act of bribery under similar circumstances and about the same time. The same course was pursued as to each of these witnesses in respect to the pardon, and being compelled to answer as in *John Pougher's case*. It was then arranged that, if the two points or either of the points should be disposed of in favour of the defendant, a *nolle prosequi* was to be entered, and that for the purpose of disposing of the points the Court of Queen's Bench should be in the same position as the Judge, and consider whether the Judge ought to have directed the jury to acquit. The jury returned a verdict of guilty on the third count only.

November 13.—*Edward James* (with him *Price* and *T. Jones*) moved for a new trial on the grounds, first, that the Judge was wrong in compelling the witness *Pougher* to answer, and in receiving the answer so obtained; secondly, that there was no corroborative evidence of *Pougher's* testimony. Suppose the Judge was wrong in compelling the witness to answer, and in receiving the answers so obtained.

HILL, J.—Is it a question of improperly admitting evidence? The evidence is proper; the evidence is admissible according

all the rules of law; but there is a privilege in the witness (it may or may not be so) which only appertains to him and does not appertain to the party. Suppose that the witness was perfectly willing, the party could not object, and say, "You are not to answer because you will criminate yourself." He might say, "No; the interests of truth and justice are paramount, and I will give the evidence." The Judge might say, "No; I will not allow you that privilege." That is something about which the witness can complain, but the party cannot. The question has arisen in a case where an attorney is asked to disclose that which his professional duty would prevent his disclosing. He is willing to waive it, and the client is willing to waive it. The party in the suit cannot interpose and say he will not have it.

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James.—This is a case peculiar in its circumstances. The learned Judge, if it had not been thoroughly consented to by the Crown that the defendant was to have the benefit, although there may have been no case in point on this doubtful question, would not have compelled the witness to answer the questions, and the defendant could not have been convicted. In *Rex v. Reading* (7 St. Tr. 296), it was held that the witness was privileged from answering questions respecting the commission of an offence, although he had received a pardon. And by the 12 & 13 Will. 3, c. 2, it is provided that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament. In this case the prosecution was instituted in pursuance of a resolution of the House of Commons. Secondly, there was no corroborative evidence of Pougher's testimony, and the Judge ought to have directed the jury not to act upon it. There exists a course of practice in the administration of the criminal law of this country, that a man cannot be found guilty on the simple evidence of an accessory, and it is put upon the principle that if you allow a man who comes forward and states he is guilty of a crime to give evidence against another, you enable a guilty person to come forward and charge an innocent person, and upon his simple statement to convict him. A practice has arisen and been in force for a considerable time, that a man cannot be convicted upon the evidence of an accessory, except there is some corroboration of it. In this case there was no corroboration of any of the witnesses within the true spirit of this rule. At the trial the Judge should have adopted the ordinary course, and have told or directed the jury that, as there was no corroborative evidence, they ought not to act upon the evidence of the witness.

COCKBURN, C.J.—If he told them the practice was generally not to act on the evidence of an accomplice without being confirmed, but if the evidence made out to their minds that he was speaking the truth, they ought to believe him, I think his direction was right. I protest against its being the duty of the Judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated.

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WIGHTMAN, J.—The law does not of necessity require any corroboration.

James.—The subject is discussed in 1 Phillips on Evidence, and the various cases commented upon, and at page 101 it is said: "On a review of the cases above cited, the result that may be deduced from them seems to be, that, on the trial of a prisoner against whom an accomplice appears as a witness, there should be (in order to warrant a judge in advising a jury to give credit to such a witness, and to warrant the jury in convicting) some confirmatory evidence that is proof independent of the evidence of the accomplice, from which it may be reasonably inferred that the prisoner was concerned with the accomplice in the commission of the crime."

COCKBURN, C.J.—It is stated very well in Taylor on Evidence, 796; "The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said they ought not to believe him unless his evidence is corroborated by other evidence, and without doubt great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists upon the subject, and the jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that judges in their discretion will advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration, and the practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the judge. Considering too the respect which is always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the case from the jury by positive directions to acquit, but only advise them not to give credit to the testimony." I think that is a fair exposition of what the present practice is. We think that he ought not to have told the jury to acquit if the witness was uncorroborated.

The COURT, after consulting Martin, B., granted a rule *nisi* on both grounds.

The *Solicitor-General* (Sir W. Atherton), *Monk* and *Cleasby*, showed cause against the rule, and *Edward James*, *Price* and *T. Jones* supported it (Feb. 12 and 13, 1861, at the sittings after Hilary Term).

CROMPTON, J.—This rule was moved for on one ground, that there was no corroboration of the witness Pougher. It may be a question whether Pougher was an accomplice of the defendant's; but, treating him as an accomplice, the question is, was the judge warranted in the direction he gave to the jury? The law is laid down correctly in *Reg. v. Stubbs*, 7 Cox C. C. 48; 1 Dears. C. C. 555, by

Jervis, C. J. : "It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice, for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation." To my mind, there was fully sufficient corroboration to warrant the verdict of the jury. It is not necessary that the corroboration should be as to the very facts stated by the witness. What corroboration is sufficient may depend on a variety of circumstances.

The rest of the Court concurred.

The Court discharged the rule so far as related to the want of corroboration of the witness Pougher, and directed that the other point should be argued in the following Easter Term by one counsel on each side.

April 25.—*Cleasby* argued for the Crown, and *Edward James* for the defendant.

Authorities cited:—Tayl. Ev. 1174; *The People v. Mather*, 4, Wendell's New York Rep. 254; 4 Bl. Com. 259; 4 Inst. 22-3; Com. Dig. Parl. L. 28 to 40; Seld. Jud. Parl. 36; Hallam's Engl. cap. 12, s. 2; Vin. Abr. E. 2; *Fisher v. Ronalds*, 12 C. B. 762; *R. v. Lord Shaftesbury*; 3 Inst. 236; Com. Dig. tit. "Pardon," B.; 9 & 10 Will. 3, c. 32.

Cur. adv. vult.

COCKBURN, C. J.—This case comes before us under peculiar circumstances. On the trial of the defendant on an information by the Attorney-General for bribery, a witness who was called to prove the fact of his having received a bribe from the defendant, objected to give evidence, on the ground that the effect of the evidence he was called upon to give would be to criminate himself. Thereupon the counsel for the Crown handed in a pardon under the Great Seal to the witness, who accepted it. The witness, however, still objected to give evidence, and the learned judge who presided at the trial, entertaining a doubt as to whether the witness could be properly compelled to answer, notwithstanding the pardon, an arrangement was come to between the counsel on both sides, with the sanction of the judge, that the witness should be directed to answer, but that the opinion of this Court should be taken as to whether the privilege of the witness remained, notwithstanding the pardon, the counsel for the Crown undertaking, in the event of the Court holding in the affirmative, to enter a *nolle prosequi* if the defendant should be convicted. We think it necessary to protest against a repetition on any future occasion of a proceeding which we believe to be wholly unprecedented, it appearing to us inconvenient and unbecoming that this Court should be called upon to pronounce a judgment which it is

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without authority to enforce. It is perhaps to be regretted that under such circumstances a rule *nisi* should have been granted. Probably, had the rule *nisi* for a new trial been moved for on this ground alone, we should have refused the rule; but the rule having been moved for on other grounds as well as on this, it was somewhat improvidently allowed on this ground also. Now, however, the matter having been discussed on a rule granted by us, we think it best to pronounce our opinion on the point submitted to us, but we are anxious to protect ourselves against the present proceeding being drawn into a precedent or adopted on any future occasion. Upon the first argument we held that the pardon took away the privilege of the witness, so far as regarded any risk of prosecution at the suit of the Crown; but it was objected that a pardon was no protection against an impeachment by the Commons in Parliament, and on this point the case was argued before us in the last term. The question on which our opinion is now required is, whether the enactment of the third section of the Act of Settlement, the 12 & 13 Will. 3, c. 2, "that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament," is a sufficient reason for holding that the privilege of the witness still existed in this case, on the ground that the witness, though protected by the pardon against every other form of prosecution, might possibly be subject to parliamentary impeachment. In support of this proposition it was urged on behalf of the defendant that bribery at the election of members to serve in Parliament being a matter in which the House of Commons would be likely to take a peculiar interest, as immediately affecting its own privileges, it was not impossible that if other remedies proved ineffectual, proceedings by impeachment might be resorted to. It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *malá fide*, would be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale in *Osborn v. The London Dock Company*, 10 Ex. 701, and acted upon by Stuart, V. C., in *Sidebottom v. Adkins*, 3 Jur. N.S. 631, is the correct one, and that to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Indeed, we quite agree that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by Alderson, B., in *Osborn v. The London Dock Company*, that a question which might appear at first sight a very in-

noctent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to put the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the, unhappily, too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied to the case of this witness would be simply ridiculous, more especially as the proceeding by information was undertaken by the Attorney-General by the direction of the House itself, and it would therefore be contrary to all justice to treat the pardon, provided in the interest of the prosecution to insure the evidence of the witness, as a nullity, and to subject him to a proceeding by impeachment. It appears to us, therefore, that the witness in this case was not in a rational point of view in any the slightest real danger from the evidence he was called upon to give, when protected by the pardon from all ordinary legal proceedings, and that it was therefore the duty of the presiding judge to compel him to answer. It follows that, in our opinion, the law officers of the Crown are not bound to enter a *nolle prosequi* in favour of the defendant.

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Rule discharged.

COURT OF QUEEN'S BENCH.

June 10, 1861.

(Before COCKBURN, C.J., WIGHTMAN, J., CROMPTON, J.,
and BLACKBURN, J.)

REG. v. CHARLESWORTH. (a)

Information—Pleading facts occurring at trial—Not guilty—Double pleading not allowed in misdemeanor.

On the trial of an information filed by the Attorney-General, charging the defendant with bribery at an election, the principal witness for the prosecution refused to answer certain questions, and was committed for contempt, and the judge discharged the jury without giving a verdict. The defendant had pleaded not guilty, and he now desired to plead in addition the several matters which occurred at the trial:

Held, that he could not do so, as he would then be pleading double, but that the whole facts might be set out on the record, so that he might take any steps he might be advised in a court of error.

THIS was a rule calling upon the defendant to show cause why a plea pleaded by the defendant in bar of further proceedings should not be taken off the file.

An information had been filed by the Attorney-General, under the Corrupt Practices Act, charging the defendant with bribery at the Wakefield parliamentary election, and at the trial before Hill, J. one of the witnesses named Fernandez, who was called on the part of the prosecution, refused to give evidence, whereupon the learned judge sentenced him to a fine of 500*l.*, and committed him to prison for contempt of court, and the jury were discharged from giving any verdict.

For the defendant it was contended that the prosecutor's case

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

having failed, a verdict ought to have been returned for the defendant, but in anticipation of the information being again taken down for trial, an order was obtained by the defendant, granting him leave to file a plea in the nature of a plea *puis darrein continuance*, in order to raise, as a defence to the information, the point that the defendant had already once been put upon his trial, and could not be a second time put in peril for the same matter.

The plea of not guilty still remained on the record, and the following is a copy of the new plea pleaded:—

“Trinity Term, in the 24th Vict. And now (that is to say), on the 22nd May, in this same term, before our said Lady the Queen, at Westminster, cometh the said John Barff Charlesworth, by the said Charles Fiddey his attorney, and saith that the said Attorney-General for our said Lady the Queen ought not further to prosecute the above mentioned information against him the said John Barff Charlesworth, or to proceed to the trial of the said issue above joined, because he says that heretofore (to wit) on the 7th day of March, 1861, at York, in the county of York, at the assizes then and there holden in and for the said county, before the Hon. Sir Hugh Hill, Knight, and the Hon. Sir Henry Singer Keating, Knight, justices of our Lady the Queen, duly assigned to take the assizes in and for the said city, the jurors of the jury aforesaid, being then and there called, did then and there come: thereupon William Howson, Joseph Hunter, Stephen Cattley, Peter Whiteley, Samuel Roberts, Thomas Cass, Botterill Johnson, William Sursden, Foster Shaw, Tom Holdsworth, George Holdsworth, and George Goody Kemp, twelve of the jurors last aforesaid, were then and there duly called, and did then and there duly answer to their names respectively, and were then and there duly sworn and empanelled to try the issue above knit and joined between our sovereign Lady the Queen and the said John Barff Charlesworth. And the said jurors so sworn and empanelled were then and there duly charged with the said John Barff Charlesworth, who was then and there duly given in charge to the last-mentioned jurors so sworn and empanelled as last aforesaid, and Sir William Atherton, Knight, her Majesty's Solicitor-General, as counsel for and on behalf of our Lady the Queen, who then and there prosecuted for our said Lady the Queen in that behalf, did then and there produce divers (to wit) eight witnesses for and on behalf of our said Lady the Queen, who were then and there duly sworn, and then and there gave evidence to the said court and the said jury so sworn and empanelled and charged with the said John Barff Charlesworth as aforesaid, touching the said supposed misdemeanors above laid to his charge. And the said John Barff Charlesworth further says, that after the said jurors were so charged with the said John Barff Charlesworth, and during the trial of the said issue, José Louis Fernandez, one of the said witnesses for and on behalf of our said Lady the Queen, refused to answer a certain question put to him by the counsel for and on

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behalf of our said Lady the Queen ; whereupon the said Sir Hugh Hill, one of the said justices, having delivered his opinion that the said José Louis Fernandez was bound by law to answer the said question, and he still refused to answer the same, the counsel for our said Lady the Queen declined further to proceed with the trial of the said issue, and called upon the said justice to discharge the said jurors from giving any verdict thereon, against which the said John Barff Charlesworth, by his counsel in that behalf, protested and objected, and requested the said justice to proceed with the trial of the said issue, so that the jurors aforesaid might deliver their verdict thereon, which the said justice refused to do ; and thereupon the said justice then and there for the reason aforesaid and for no other cause whatever, without the consent and against the will of the said John Barff Charlesworth, discharged the said jurors of the said John Barff Charlesworth, and from declaring or giving their verdict on the said issue. And this the said John Barff Charlesworth is ready to verify, &c. ; whereupon he pray judgment, and that he may be dismissed by the court here of the premises in the said information mentioned, and be acquitted thereof and go thereof without day, and that the same may not be further prosecuted against him the said John Barff Charlesworth &c."

Sir *F. Kelly*, (*Bovill*, *Mellish* and *Maule* with him) now showed cause.—The question is a most important one, and amounts to this: shall trial by jury be taken away and the power of determining the prosecution be vested in the judge? The Crown should either traverse the plea if untrue in point of fact, or reply to it, or demur to it, so that the opinion of the court might be obtained whether the plea was a valid one or not, and then the question might be afterwards taken, if necessary, to the court of error. This is in effect a plea *puis darrein continuance*, it is a right of the subject to raise the question of the discharge of the jury by this plea: (*Conway and Lynch v. The Queen*, 1 Cox Crim. Cas 210, 7 Ir. L. Rep. 149.) There the prisoners were put upon their trial for felony, and the jury, not being able to agree, were discharged, they were tried a second and a third time, and on the third trial a plea of the discharge of the jury was put upon the record. [CROMPTON, J.—If the defendant pleads this in bar, he cannot plead it without withdrawing his plea of not guilty ; other wise he would be pleading double, which cannot be done in a criminal case.] We need not abandon the plea of "not guilty ; it was not done in *Conway and Lynch v. The Queen*. [BLACKBURN, J.—There the counsel waived all objection as to form CROMPTON, J.—It is a plea in bar in consequence of something happening after the prosecution ; it prays judgment of acquittal I think the Crown here is taking the proper course. In *Conway and Lynch v. The Queen*, Crompton, J. complained that the plaintiffs in error had pleaded double.] No ; all he objected to was that the plea itself was double. Error in mere form is amendable ; the question here is one of substance, whether this plea is

pleadable at all. Notice has been given to the Crown-office, the Treasury and the Associate, to produce the record, which ought to contain an entry of the discharge of the jury, and the reason for that discharge. [The *Solicitor-General*.—This is a record of this court, and entries will be made on it as on a record at Nisi Prius; at present only minutes are prepared, from which the record will be made up hereafter. BLACKBURN, J.—I certainly thought that in a misdemeanor the defendant could not plead double, but if he desired to plead a special plea in bar, he must withdraw his plea of "not guilty."] In felony a man may plead *autrefois acquit*, and also plead over; this partakes somewhat of *autrefois acquit*, and also of a plea *puis darrein continuance*, but it is not exactly either. He referred to *R. v. Newton*, 3 Car. & K. 88. [COCKBURN, C. J.—You must try the whole record: this is analogous to *autrefois acquit*. You are proposing to do what you could not do if there had been an acquittal; why should you be in a better position?] If any mode can be suggested to obtain the opinion of the court before proceeding to trial, the defendant's object will be attained. In the case of *Reg. v. Davison*, 8 Cox Crim. Cas. 360, 2 Fost. & Fin. 250, the jury not being able to agree were discharged, and the indictment was removed to the Central Criminal Court by *certiorari*. In *Whitbread's* case, 30 Car. 2, there was an indictment against three, and the case was only proved as against one; the judges discharged the jury as to the two, in order that the case against them might be amended, and they were afterwards convicted. The record is not in the power of the defendant. [WIGHTMAN, J.—It can be made perfect before the trial. COCKBURN, C. J.—Are you agreed upon the facts? The *Solicitor-General*.—The facts are correctly set out in the plea, but not with sufficient fulness.] The whole facts should appear upon the record, so that defendant may take it to the court of error, which cannot be done till there is a final judgment. [COCKBURN, C. J.—If you had leave to plead this plea, it could only be on the distinct understanding that the plea of not guilty was withdrawn.] That is assuming that the pleading is double. Chitt. Pleading; Hawkins, P. C.; and 2 Reeves' Hist. of English Law, 267; 3 Ib. 233, were also cited.

The *Solicitor-General*, Overend, Monk, Cleasby and Welsby, contra, were not called on.

COCKBURN, C. J.—I am of opinion that the rule to take this plea off the file ought to be made absolute. This plea cannot be allowed to remain on the record as it now stands. The first objection is, that the record would then show a double defence, or that which would amount to it, which cannot be done. It has been laid down on high authority, that a plea of this nature cannot be pleaded to a misdemeanor. I think the proper mode will be to have the facts entered upon the record, and then the defendant may take what advantage he can of them. The *Solicitor-General*, as I understand, makes no objection to adopt the facts as stated in the plea, and when they are amplified and set out on the

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record, the defendant will have every opportunity of taking any advantage he may derive from them. I think the pleading, as proposed, would be bad for duplicity; there ought not to be a statement on the record and a plea setting out the same facts. Whatever advantage defendant can take, he ought to take in a court of error, and not as a mere matter of pleading. The plea, therefore, cannot be allowed, but the defendant can have the facts upon the record, and can then take such steps as he may be advised.

WIGHTMAN, CROMPTON, and BLACKBURN, JJ. concurred.
Fiddey, attorney for defendant.

Rule absolute.

COURT OF QUEEN'S BENCH

June 22, 24, 25 and 26, 1861.

(Before COCKBURN, C.J., WIGHTMAN, J., CROMPTON, J.,
and BLACKBURN, J.)

REG v. CHARLESWORTH. (a)

*Abortive trial—Misdemeanor—Discharge of jury without verdict—
Second trial—Autrefois acquit—Error.*

On the trial of an information filed by the Attorney-General under the Corrupt Practices Act, charging the defendant with bribery at a parliamentary election, the principal witness for the prosecution refused to answer certain questions, and was committed for contempt of court, and the judge discharged the jury without giving a verdict.

The Court discharged a rule nisi calling on the Crown to show cause why judgment should not be entered for the defendant, and that he be dismissed and discharged from the premises and depart without any day, and why the award of jury process and all other proceedings for a second trial should not be stayed.

AN information had been filed by the Attorney-General, under the Corrupt Practices Act, charging the defendant with bribery at the election for a member of Parliament for Wakefield, and at the trial, before Hill, J., one of the witnesses named Fernandez, who was called on behalf of the prosecution, refused

(a) Reports by JOHN THOMPSON, Esq., Barrister-at-Law.

to give evidence, whereupon the learned judge fined him and committed him to prison for contempt of court, and the jury were discharged from giving a verdict.

Subsequently the court refused to allow the defendant to plead those facts, but directed that they should be set out on the record. The defendant then obtained a rule, calling on the Crown to show cause why judgment should not be entered for the defendant, that he be dismissed or discharged of and from the premises in the information in this prosecution specified and charged upon him, and that he depart without day in that behalf, and why the award of jury process and all other proceedings in this prosecution should not be stayed.

The *Solicitor-General*, *Overend*, *Cleasby* and *Welsby* showed cause on behalf of the Crown, and Sir *F. Kelly*, *Bovill*, *Mellish*, and *Maule* supported the rule. Authorities cited:—*Kinloch's case*, *Foster's C. C.* 16; *R. v. Wade*, 1 *Moo. C. C.* 86; 18 *State Trials*, 414 (1698); *Conway and Lynch v. The Queen*, 1 *Cox, Crim. Cas.* 210; 7 *Ir. L. Rep.* 149, 169; *Newton's case*, 13 *Q. B.* 716, 721, 722, 733; *Reg. v. Davison*, 8 *Cox, Crim. Cas.* 360; 2 *Fos. & Fin.* 250; *Co. Litt.* 227 c; 4 *Bla. Com.* 360; *Ferrar's case*, Sir *T. Ray.* 84 (15 *Car. 2*); 2 *Hale's P. C.* 294; *Doctor and Student*, 271; *R. v. Edwards*, *Rus. & Ry.* 224; *R. v. Stevenson*, *Leach, C. C.* 546; *R. v. Stalvert*, *Id.* 620; *R. v. Jane D—*, 1 *Vent.* 69 (22 *Car. 2*); *R. v. Stokes*, 6 *Car. & P.* 151; 2 *Bac. Abr.* "Error;" *Metcalf's case*, 11 *Co.* 70; 2 *Lilly's Entries*, 489; *R. v. Watson*, 3 *Ld. Raym.* 489; *Vent.* 489; 4 *Hawk. P. C.* 459; *Beckham v. Knight*, 7 *Dowl.* 409; *Carden v. General Cemetery Company*, 7 *Dowl.* 425; *Campbell v. Reg.* 2 *Cox C. C.* 476; 7 *State Trials*; *Whitbread v. Fenwick*, *Foster C. C.* 30; *Kelyng*, 25; *Gardner's case*, *Ib.* 46, 47; *Jones and Bever*, *Ib.* 52; *Foster C. L.* 25, 26, 30; 2 *Hallam's Constitutional History*, 575; 3 *Ib.* 10; *Bac. Abr.* "Juries," G., "How to be Kept and Discharged;" *R. v. Gould*, 3 *Burn's J. P.* 395; *Co. Litt.* 227; *Campbell v. Reg.* 2 *Cox C. C.* 476; *R. v. Perkins*, *Carth.* 465; *R. v. Jeffs*, 2 *Str.* 984; *R. v. Neville*, *Fos.* 76; *Swan v. Jeffries*, 18 *State Trials*, 1197–8; *R. v. Edwards*, 4 *Taunt.* 309, 311; *R. v. Wade*, 1 *Moo. C. C.* 86; *Stone's case*, 1794; *Hardy's case*, 1796; *C. L. P. A.* 1854, s. 19; *R. v. Wellborn*, 6 *Jur.*; *R. v. Bourne*, 7 *Ad. & El.* 58; *R. v. Trafford*, 8 *Bing.* 204; *Campbell v. R.* 11 *Q. B.* 799; *Taverner's case*, 3 *Bul.* 173; *Livingstone's case*, *Vent.* 97; *Lord Delamere's case*, 4 *State Trials*; *Horne Tooke's case*, 25 *State Trials*; *Lord George Gordon's* 24 *State Trials*.

COCKBURN, C. J.—I am of opinion that this rule must be discharged. I adhere to the view expressed by the Court in the course of the argument, that if we could see our way clearly to the conclusion that the learned Judge, in discharging the jury in this case, had exceeded the limits of his judicial authority, and also could see that the discharge of the jury operated virtually as an acquittal of the defendant, the Court ought not to allow its process to

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be further issued with the view to the prosecution of a second trial, but ought to make this rule absolute to enter final judgment for the defendant, notwithstanding that course might place the Crown in a more disadvantageous position with reference to the bringing error upon such judgment of this court. But I am equally clear that, unless the court can see its way conclusively to that result, it ought not to interfere in the present stage of the proceedings, but ought to leave the defendant, if on the second trial he should have the misfortune to be found guilty, to move in arrest of judgment or bring his writ of error as he may be advised. Two questions present themselves—the one whether the learned Judge had authority to discharge the jury under the circumstances of this case; the second, whether the effect of that discharge of the jury, if done without authority, entitles the defendant at once to the judgment of this court that he go without day. Upon neither of those propositions is my mind at the present moment in that state of conviction and certainty that I feel that the court ought to interpose in the manner prayed. On the contrary, I am bound to say, although I by no means desire that this should be considered to have the character of a definite opinion and judgment, that the present inclination of my mind is adverse to the defendant upon both those points. In the first place, with reference to the question of the authority of the judge to discharge the jury, I think it is impossible, after the argument that we have heard, and the authorities which have been brought to our notice, not to feel that the law is, to a certain extent, in an unsatisfactory condition. I apprehend that in no part of our procedure has the practice of the courts more fluctuated than with reference to the question of the discharge of juries on criminal trials. If we go back to my Lord Coke we shall find him stating, in the most positive and unqualified terms, that a jury once sworn and charged in the case of life or member cannot be discharged by the court or any other, but must give a verdict. Now it is plain that that does not embrace several of those cases in which it is admitted on all hands that a jury may, according to modern practice, be discharged. My Lord Coke takes notice neither of the case of the death of a jurymen, nor of the illness of a jurymen, rendering it imperatively necessary that the trial should be stopped. It was pointed out, indeed, by Mr. Mellish, in his most lucid and able argument, that my Lord Coke must be considered as not comprehending that case, simply because the jury would, *ipso facto*, be discharged, in such cases, by the mere force of circumstances, inasmuch as either by death or by such illness as rendered his departure from the court a matter of absolute necessity the jury would be reduced below the lawful number, and would, therefore, be dissolved. But it must further be observed that, Lord Coke takes no notice of cases in which it is admitted now that a jury would be properly discharged, as in the case of a discharge at the desire of the accused with the assent of the prosecution, or the

case (one now of every day occurrence), of a jury being discharged on account of the impossibility of their agreeing to their verdict. And, indeed, if we go back to the period at which Lord Coke wrote, the earlier period of our law, one sees that the very object of the coercion to which juries were subjected in those times was to enforce by *duress*, if necessary, the unanimity of verdict which the law required. Hence the practice of even taking juries in carts to the confines of the county, keeping them together for the purpose of compelling them to give a verdict, at however much of personal inconvenience, sacrifice, and suffering, and not discharging them until the commission of the learned judge was at an end, by his ceasing to be within the confines of the county to which he had been sent. If then this was the law at the time Lord Coke wrote, certainly the law has undergone many most important changes at later periods. But I think it may perhaps be questioned, notwithstanding the authority of that great name, whether my Lord Coke was well warranted in laying down the law in the positive form in which he stated it; for if we look to the passage in Doctor and Student which was referred to in the course of the argument, if we look to what was stated at the conclusion of the report of *Mansell's* case, in Anderson, it would certainly lead one strongly to surmise that a different practice existed in the courts anterior to the day at which Lord Coke wrote. And it is observable that he founds his doctrine on the authority of a single case, and I think it is impossible not to believe that Foster, J., was perfectly right when he said that that case did not warrant the conclusion at which Lord Coke had arrived. At all events it would seem that at a very short period after Lord Coke wrote, the doctrine thus laid down by him in the second and third Institutes was not recognised as the true doctrine by the judges at the time to which I have referred, for we find, from the explicit statement of Lord Hale, who wrote within a comparatively recent period after the publication of Coke's Institute, that the practice not only at the great Criminal Court of this country, the Old Bailey, but upon the circuits, was directly contrary to the doctrine laid down by Lord Coke, and that both at the Old Bailey and on the circuits it was the habit and practice of the judges, in cases where the prosecution appeared about to break down from failure of proof, to discharge the jury in order that an opportunity might be afforded of supplying the deficiency. One of two things—either the propositions of Lord Coke on this subject were not considered by the judges who immediately followed him as the true exposition of the law, or else this was considered not a rule of positive law, but simply of practice and procedure, subject to variation by the authority vested in the courts of this country to regulate their own practice; because it is quite clear, and there can be no doubt about it, that that which has been ascribed in the course of this argument, and elsewhere, to a tyrannical and oppressive practice which arose in the time of the Stuarts, was in fact a practice which existed for many years anterior to the time when its abuse caused it to be brought into question. For there

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can be no doubt that, although by Chief Justice Scroggs and his fellow-justices in the case of *Whitbread and Fenwick*, to which so much allusion was made in the course of the argument, this practice of discharging juries for the purpose of furthering the administration of justice and preventing its frustration was converted
f into an engine of party and political oppression, yet when after-
" wards *Whitbread and Fenwick* were a second time put on their trial it is a total mistake to say that even Scroggs and his associates wrested or violated the law; they only held that to be the law which, according to Lord Hale, had been for many years before by the most virtuous judges, himself among the number, treated as the law and administered as such. But I can quite understand this, that in consequence of the scandalous abuse of this judicial power and discretionary authority as an instrument of tyrannical oppression in such a case as the one to which I have been referring, the judges would consider whether the benefit to be obtained in preventing the occasional defeat of justice, owing to defective evidence by the postponement of a trial, was not bought at too dear a cost, seeing the abuses to which such a practice was liable to be exposed, and therefore came, no doubt, the consideration of the judges among themselves, to which Lord Holt referred when in *Perkins'* case he stated the law as the judges had agreed that it should in future be administered. Whether that was upon a consideration of the authorities and a preference of my Lord Coke's view to that which had been adopted in the period which elapsed between his time and Lord Hale's time, and the time of the Revolution, I know not, or whether it was a matter of arrangement among themselves as a matter of policy and expediency—it is difficult to say. It may have been either. There is a great deal to be said, I think, on both sides of the question. As Lord Hale points out, it is a grave and a lamentable thing, a great scandal sometimes as well as a lamentable thing, that from some defect of evidence which ought to have been forthcoming, and which probably, by a postponement, might easily be supplied, notorious criminals escape the punishment which ought to await them, it being plain that a single case of escape from punishment upon manifest, although not legally proved guilt, is of the most mischievous consequence, one such escape operating to encourage others to commit crimes infinitely more than the conviction and punishment of many guilty men will operate to deter them from so doing. But, on the other hand, there can be no doubt that it may in many instances become the means of imposing great hardship and oppression upon the prisoners, especially of the lower class, as such persons generally may find means on a single occasion to obtain legal assistance, and the presence of witnesses who could speak to their innocence, and on the second occasion might want means to provide those advantages. Therefore, I think, on the balance of good or evil, the law or practice, call it which you please, established after the Revolution, and which has existed from that time to the present, is on the whole by far the better one, and the one which ought to be adhered

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STATUTES.

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to. The question is, however, whether it is a rule of positive law, or whether it is one of practice; and then arises the question whether it is open to exception, and whether the present case would come within any such exception. What I am at the present moment pointing out is, that the law has fluctuated, and has been differently stated at different periods; for even, as stated by Lord Holt, as the resolution of the collective judges of England, it is quite plain that that statement of the law is no longer conformable to the practice which has prevailed at subsequent periods; for Lord Holt states these three propositions—that in capital cases a juror cannot be withdrawn though all parties consent to it; that in criminal cases not capital a juror may be withdrawn if both parties consent, but not otherwise; that in all civil cases a juror cannot be withdrawn but by the consent of all parties. Now, the first proposition was overruled in the case so much adverted to—*Kinloch's* case—because there the prisoner desired it and the Crown assented to it. I see no difference between the case of the prisoner desiring it and the Crown assenting, and the case of the Crown desiring it and the prisoner consenting, if the prisoner considers that the postponement of the trial and the discharge of the jury will operate to his benefit. I cannot understand a principle such as that contended for on the part of the defendant, that there shall be this authority if the prisoner initiates the application and the Crown consents to it, and that there shall not be the same authority if the Crown initiated it and the prisoner for his own purposes and convenience assented to the proposition; but the proposition as found in Lord Holt would embrace the case which actually arose in *Kinloch's* case, because there was the consent of both parties. But besides that he goes on to say that, in criminal cases not capital, a juror may be withdrawn if both parties consent, but not otherwise; and so in civil cases. That entirely excludes the case of necessity. It excludes the case which I may call a case of *quasi* necessity, where the jury is discharged in consequence of their not being able to agree. It is said, however, that that is a case of necessity too. I do not agree in that proposition. If by necessity you mean, as was argued for, physical necessity—that is, that the jury, from inability any longer to discharge their functions of jurymen, must be discharged, because it would be an inhuman practice to keep them together any longer—there are many cases in which we now discharge juries where that state of torture does not arise, and I understand even Sir Fitzroy Kelly to admit that if a judge becomes satisfied that the difference of opinion among the jury is permanent, and that there is no hope of their being brought to unanimity, a judge has then authority to discharge them. I entirely agree in that. It is not necessary that you should wait, and, on the contrary, you ought not to wait, until the jury are exposed to the distress which arises from exhaustion or prostrated strength of body and mind, or until you have the chance of conscience and conviction being sacrificed for the sake of personal

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convenience and to be relieved from suffering. Our ancestors seem to have thought differently. They seem not to have cared by what means unanimity was secured so long as it was secured; but I think in our time that doctrine would not be entertained or acted upon by any one. Therefore I say the statement of the law as laid down by Lord Holt is not in conformity with modern views upon the subject. Then we have a third statement of the law in Blackstone's Commentaries, that the jury cannot be discharged, unless in cases of evident necessity, until they have given in their verdict. There again, I say, that is not a true or correct exposition of the law as practised in our day. We do take on ourselves without the consent of parties, both in criminal and civil cases, when we find a jury have given a case all the attention they can bestow on it, that they have fully considered it and that they cannot agree—we, when satisfied that that is the true state of the facts, do take on ourselves to discharge juries; and I trust that no judge will shrink from taking that course, because, as I said before, neither ought the jury, if they cannot conscientiously bring themselves to an unanimous view of the subject, to be exposed to personal suffering, in order to obtain that unanimity, nor ought the parties to be exposed to the danger of a verdict which is not the result of the true conviction of those who are to decide the case, but the result of the suffering of those who cannot endure the inconvenience, and who must give way to those who happen to be stronger in mind or body than themselves. At the same time, while I cannot but point out these fluctuations in the law, I, as I have already said, entirely concur in this, that looking at it upon the whole, the doctrine or the rule, whether of law or of practice I care not, that a jury shall not be discharged at the instance of the prosecutor, in order to enable him to obtain evidence of which at the trial there appears to be a failure, is a sound, salutary rule, and one that ought not to be departed from. Whether it be positive law, or whether merely a regulation of practice made by the judges in the time of Lord Holt, is to me a matter of comparative indifference: it has been the uniform practice of the judicial authorities of this country from that time to the present, and I take it that a *rata praxis* like that becomes substantially a part of the law, and that no judge or body of judges ought to depart from it, and if it is found inexpedient, with a view to the administration of justice with reference to those results that Lord Hale adverts to, it should be the act of the Legislature by which such a practice should be altered, and not the regulation of a body of Judges, still less the act of the individual Judge. But, at the same time, I should be exceedingly reluctant to say that there may not be cases in which there may be superadded to the mere defect and failure of evidence some additional circumstance which may call for the exercise of judicial authority to prevent a defeat of justice; and I am, therefore, exceedingly reluctant to lay it down that the law is a positive law, such as either Lord Coke or Lord Holt have referred to in the passages to which our

attention has been called. In the course of the argument I put the case of a witness either kept away from the court or present in the court, and refusing to give evidence in consequence of having been tampered with by the prisoner, or those acting on behalf of the prisoner or the accused, and justice thus frustrated, and I am not prepared to say that in such a case it would not be the duty of the judge to interpose, and to take upon himself, by virtue of his judicial authority, to prevent the frustration—the scandalous frustration of justice, which would take place if a man were to be acquitted under such circumstances. I put that more than once in the course of the argument, and I did not hear it fairly grappled with. Even Mr. Mellish, with his clear, logical mind, and his ability as a disputant, did not appear to me to be competent to grapple with the case. It may be said, it is true, that it is better that in such cases there should be the defeat of justice, however humiliating to those who administered it and the public who have an interest in its administration, rather than that a great principle and a salutary rule should be infringed upon; and it was said that, although it is true that no man even in his wildest dreams would think of imputing corruption to English Judges, or the possibility of their being influenced by corrupt motives, the Judges might be rash, or vain, or impatient, and under such circumstances lend themselves to the purpose of oppression in the administration of the criminal law. I own that I am not influenced by any such idle apprehensions. I have been now for some years at the bar and on the bench, and have seen a good deal of the administration of justice, and I never yet saw a Judge who, either from rashness, or vanity, or impatience, would lend himself to any such purpose, or do anything that was not right and fair to the best of his knowledge and ability, between the Crown and the party accused. It would not be becoming in me to vindicate, or think of vindicating, myself from any such possible imputation; but as regards those with whom I have the honour to act, either in this Court or any other Court, I must say, with reference to any such offensive imputation, that I believe the Bar of England would at once repudiate the notion of there being any chance whatever of danger to the accused, from either the rashness, the vanity, or the impatience of the Judges. Impatience there may be sometimes—the question is, whether it is not an honest and well-justified impatience when elaborate arguments are wasted upon immaterial or undisputed propositions; or, when material matters are in question, instead of forensic argument and disputation, time is occupied in idle and commonplace declamation, or when arguments and observations are repeated again and again, and over again, to the wasteful abuse of the time of the Court, which is, in fact, the time of the suitors and the country. Now I say this, that I am not prepared, either as a matter of law or as a matter of expediency, to give up the judicial authority of a Judge presiding at a criminal trial, in a case where justice is frustrated by what may be deemed to be the

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act of the prisoner, or something in which he concurs and co-operates, to allow justice to be defeated rather than exercise the authority which he may be believed to possess of postponing the trial by discharging the jury. That would bring us, however, to this question, whether there are cases where, independently of the concurrence of the accused in the means whereby justice might be frustrated but for a postponement of the trial, a Judge may be justified in exercising such a discretion; and we must take it here that in this case the act whereby justice was defeated, or about to be defeated (although of course we do not assume that the prisoner was guilty upon the charge preferred against him, yet justice was frustrated in this, that the inquiry, which it is clear was a legitimate inquiry to be gone into), was prevented by the act of the witness. But I must take it on this record that the accused was not a co-operating party with the witness, and the question is, whether under those circumstances, even supposing that a Judge has in some cases the authority to which I have been adverting, this was a case in which it could properly be exercised. The inclination of my opinion is that, under all the circumstances, if my learned brother who presided at this trial had the authority in question, it was a case in which it was not wrong to exercise it. On that there might be difference of opinion; some might think it was a case for its exercise, others not. I do not desire to give—it is not necessary in the view I take of the case to give—any definite opinion on the subject. I think it is one of those cases on the confines in which it is difficult to say what one would have done on the subject. This I know, that a more careful, cautious, or conscientious Judge than the one who did act and exercised his discretion on this occasion never sat upon the bench, and, as I find that all he doubted of was his legal power, but that he entertained no doubts as to this being a fit case for its exercise, if he possessed it, far be it from me to say that he acted wrongly. But this is not the only difficulty in this case. We come to the second question in the case, and that appears to me to present, if possible, still greater difficulties in the way of the defendant. Assuming even that the Judge had not this power, or that he exercised it improperly, then comes the question, whether what he has done amounts to an acquittal of the prisoner, so as to entitle the prisoner to have judgment entered up for him as though he had been acquitted, because that is the practical result of the judgment which we are now asked to enter up on behalf of the defendant. I must say on this I can add nothing to the conclusive reasoning of Crampton, J., in the case in 7 Ir. Rep., on which so much observation has been made. No case of such a plea as this, except in that case, has ever been known to the law. It may be said, and with truth, that that may be because, since the practice has been established from the days of Lord Holt, juries have not been discharged, and therefore the occasion of such a plea has never presented itself. On the other hand, all I can say is this—agreeing entirely with

Crampton, J,—that the only plea which are known to the law of England to stay a man from being tried upon an indictment or an information (and really we must consider this as though there were a fresh information, and that the defendant had pleaded to it that which appears on the record, of which he seeks to take advantage in order to have judgment entered up for him), no plea to stay the further trial of a criminal proceeding is known except the plea *autrefois acquit* or *autrefois convict*, and it is clear that this amounts to neither. It is said that a man is not to be tried twice, and is not a second time to be put in jeopardy, and that that applies equally in a case like the present, as it does in a case where the man has been acquitted or convicted before. But in that I cannot concur. Again, I say the reasoning of Crampton, J., is, to my mind, conclusive on that subject. It appears to me, when you talk of a man being twice tried, that you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice put in jeopardy, you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass, because, if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time, and yet it is admitted that in the case of a verdict palpably defective, although the jury have pronounced upon the case, yet if the verdict be defective it will not avail the party accused, if he is a second time put on his trial. I cannot say, therefore, that, in my humble judgment, as at present advised—though it is not necessary to state more than that such is the present state and inclination of one's opinion—as at present advised, I cannot come to the conclusion that there has been in this case a trial, that the accused has been put in jeopardy, or that he is at all in a position, either in point of law or in point of fact, of a man who has been once acquitted, and who, having been once acquitted, cannot a second time be put on his trial. Now, this being the view which I take of this matter after all the attention which I have been able to give to this case—though, as I said before, I do not at all wish it to be understood that in that I am speaking as a settled and a final conviction and conclusion in this state of things—I do not think it is fitting for us to interpose, and that is all we have to deal with on the present occasion. It may be a hardship on the accused, it is true, that he should be put a second time upon his trial, when, perhaps, when this record shall finally be made up and judgment entered up one way or the other, and that be taken to a court of error, it may be held that he ought not to have been put a second time upon his trial; but that, I think, we cannot help. Probably it will be the only case in which such a question could present itself; because, if this be taken to a court of error, we shall have it finally and definitively settled, whether or not a prisoner, who, instead of having a verdict given one way or the other upon his trial, is a second time brought to trial because the jury have been discharged on the first occasion, is entitled to have

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those circumstances operate by way of acquittal, so as to entitle him to final judgment. Whenever that is settled, as I suppose it will be in this case, should it eventually become necessary, this question will no further arise. The great and important question in consideration in this case would then be finally and conclusively settled, and no such case can afterwards arise. The present question is, whether we are bound at the present moment, in this state of the record, to interfere and to prevent this case from going to its final conclusion. I think that, unless we see our way clearly and conclusively, as I said before, to the settled and certain conviction that the defendant is entitled to be treated as though he had had the benefit of an acquittal, we cannot with propriety interfere. It may be—I do not say that it is so, the inclination of my opinion is the other way—but it may be that by such a course we should deprive the Crown of the opportunity of taking this case to error. Therefore, I am of opinion that we ought not now to interfere, and that this case must take its course. Like many other cases where a Judge may have erred—if in this case he should have erred—there may be no remedy except in the event of a second trial, or in the event of a result fatal to the accused that might give him an equitable ground for the clemency of the Crown, in the shape of a pardon, if serious doubt should be entertained as to the propriety of the proceedings. But in this case even that would not be necessary, because there is the opportunity of taking the opinion of a court of error in case eventually the result of the trial should be against him. All I can say is, that at present we ought not to interfere, and therefore this rule must be discharged.

WIGHTMAN, J.—I certainly should have wished, in a case of this importance, for a longer time to consider the many and not always concurring authorities that have been cited in the course of the argument; but as time is of great importance, as it is stated, I have given them the best consideration I can. The two great questions that were argued before us were, first, whether the Judge was warranted in discharging the jury; and, secondly, whether, if he was not, the defendant should again be put upon his trial, and this Court award a *venire de novo*, or whether the defendant was entitled upon the matters appearing upon the record to judgment *quod erat sine die*. It appeared by the record that the defendant, being charged with a misdemeanor, pleaded not guilty; that a jury was empanelled and sworn to try that issue, and that because a material and necessary witness for the Crown refused to give evidence, the Judge, at the request of the prosecutor's counsel, discharged the jury from giving any verdict. Upon the first point, whether the Judge was warranted in discharging the jury, under the circumstances stated upon the record, a great many cases were cited in argument, some in which the jury had been discharged in criminal cases upon ground nearly similar to that in the present case, others in which the jury had been discharged upon the ground of necessity, as upon illness of a juryman or the prisoner, or other circumstances occurring

which rendered the further proceeding with the case impracticable; and it was said, and I believe correctly, that in no instance had the jury been discharged under such circumstances as in the present case since the Revolution. The cases will all be found collected in the report of the case of *Conway and Lynch v. The Queen* (7 Ir. Rep.), and were all commented upon in the course of the argument. In *Kinloch's* case, in Foster's Crown Law, Foster, J., in his judgment, reviews and comments upon the cases, and the law upon this point as it then existed, and expresses a strong opinion against the propriety of the Court in its discretion discharging a jury, after evidence given and concluded on the part of the Crown, merely for want of sufficient evidence to convict. But he refrains from giving any opinion as to the propriety of such a course, when undue practices have been used to keep witnesses out of the way, or where witnesses have been prevented by sudden and unforeseen accidents from attending the trial and giving evidence. The case nearest to the present, which has occurred in modern times, of which I am aware, is that of *Rex v. Wade* (1 Moo. Cr. Cas. 86), in which the prosecutrix in a trial for rape, when she came to be sworn as witness, appeared to be wholly ignorant of the nature and obligation of an oath, and the Judge before whom the trial occurred discharged the jury, in order that the necessary witness, as the prosecutrix was, might be instructed as to the matters in which she was deficient; but he reserved the propriety of the discharge of the jury for the consideration of the Judges, who all, with the exception of two who were absent, were of opinion that the discharge of the jury was wrong, and that the prisoner ought to have been acquitted, and a pardon was recommended. It is obvious that the power of discharging a jury at the instance of the prosecutor, on the ground that the evidence was not strong enough to warrant a conviction, and that upon another trial better and more cogent evidence might be obtained, is more objectionable than in that case, and calculated to produce great hardship upon the prisoner or defendant in many cases that might be suggested; and I cannot think, upon an examination of all the cases that have occurred, that such a power ought to be exercised upon such a ground, and I therefore am disposed to think that in this case my brother Hill, whose only object was to prevent that which he might reasonably consider might possibly lead to a failure of justice, was wrong in discharging the jury upon the ground suggested in the present case. But, assuming that he was wrong, the second question then arises, how can the error of the Judge, if it be one, be taken advantage of by the prisoner or the defendant, in case it is proposed to put him upon his trial a second time; or, indeed, can he take any advantage of it at all, except as a ground for the interference of the Crown, by a pardon, as recommended in the case *Rex v. of Wade*? It is said for the defendant that he is entitled to judgment upon the record as it stands of *quoad eat sine die*, upon the ground that, as the Judge at the trial ought not to have

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discharged the jury, but to have directed an acquittal, he is entitled to have the same judgment as if he had been acquitted. But no precedent or authority has been cited to warrant such a judgment in such a case. In the case of *Conway and Lynch* the Court discharged the prisoner, but it does not appear that they gave such a judgment as that now prayed. Upon a plea of *autrefois acquit* such a judgment might be given, as the jury had actually pronounced their verdict of "not guilty," but it is said that, as it is a rule of criminal law that a man shall not be twice put in jeopardy for the same offence, if he has once been put upon his trial and the jury sworn, he has been put in jeopardy, and therefore cannot by law be tried again, and so is entitled to judgment *quod eat sine die*. It is necessary to consider in such a case what is meant by putting a man in jeopardy, and at what period of the proceedings he is to be considered as so placed. If he is to be considered in jeopardy when the jury are sworn and evidence given, he has been in jeopardy, though a jurymen may be taken ill, or some unforeseen accident occur which would be within the ordinary excepted cases in which a jury may properly be discharged, or the jury may give an imperfect verdict, or one which cannot be supported in point of law—in all which cases the prisoner or defendant has been placed in jeopardy, if his being charged before a jury sworn to try, and evidence given, be a placing him in jeopardy. But in such cases there seems no doubt but that a *venire de novo* may be awarded, and that the defendant is not entitled to judgment. Has he been more in jeopardy when the jury are wholly discharged, as in the present case, than when they give an imperfect verdict, or are discharged by reason of one being taken ill before they have given any verdict at all? Many instances may be given of mistakes, fatal it may be to prisoners, which would not entitle them to judgment. Suppose a judge were improperly to admit evidence obtained under circumstances which made it inadmissible, and the prisoner were convicted on such evidence, could he claim judgment *quod eat sine die*, or must not he rely, as in *Wade's* case, upon the interference of the prerogative of the Crown to pardon him? Upon the whole I am disposed to think with Crompton, J., as expressed in his elaborate judgment in *Conway and Lynch's* case, that the true and rational doctrine is, that where a trial proves abortive by reason of no legal verdict having been given, a *venire de novo* may go, whether the result arise from the mistake of the judge or of the jury. I have not arrived at this conclusion without much doubt; but I have the less difficulty in expressing my opinion, as the objection now urged by the prisoner will be equally open to him upon writ of error, if there should be another trial, even if he should be found guilty, and if the verdict is for him the question will not arise.

CROMPTON, J.—It seems to me that the only question before us in this case is, whether or not we ought to award jury process; and I am satisfied, from the discussion which we have heard on the part of the Crown—those who appeared on the part of the

defendant, I think, were relieved on this part of the case—that the defendant has a right to come before us, and say matters appear on this record on which you ought not to award new process. Whether it is a *venire* or a *distringas*, as I believe was argued in my absence, is immaterial: it is, in effect, whether a new *venire* or process ought or not to be awarded, and whatever the result of that be it is a judicial act on our part to award the process or refuse it—an act upon which, if we awarded it improperly, no doubt a writ of error lies for the subject; and whatever the result is, whether a writ of error would lie for the Crown, which I understand was afterwards argued when I was away, in my opinion makes no difference, because I think we are bound to give our judgment that this process should not issue, if it is made out to our satisfaction that there is a matter on the record which brings it to issue. The only other question which would arise in the case is this, whether there is that matter appearing on the record which in effect terminates the proceedings, in one way of expressing it, which prevents our awarding *venire* process, or in the other way terminates it by saying the party is discharged, because, whether he is formally tried or not, if jury process is not to go, there is an end of the proceedings. Therefore it comes, in my mind, to the question, does or not the matter appearing on this record prevent fresh process issuing? Now, I certainly am not able to say that in my judgment there is anything which appears on this record which has that effect. I think that an abortive trial of this kind is not a termination of the proceedings, however it has occurred, whether by the act of the judge or by the act of the jury going away, as it was put in the course of the argument—the act of the mob disturbing the proceeding. I should doubt it even in the case of the Crown (if such a case could happen) actually interfering. I quite agree—I am not going at any length into that part of the case—with what my Lord and my brother Wightman have said as to this part of the case. It appears to me that it is an attempt to extend the old plea of *autrefois acquit*, and that there is no case, when the authorities are examined, which will at all bear out the proposition that an abortive trial does amount to such matter as that it prevents a *venire de novo* in the case of a misdemeanor. There has been a technical point taken, which was stated originally by Lord Holt and afterwards mentioned by Lord Wensleydale; there is said to be an objection of right to a *venire de novo* going in any case whatever, in the case of felony. Whether that be so or not, I own I should have a strong opinion about that. I think *Rex v. Fowler*, 4 B. & Ald. 273, to some extent is an authority upon it; but certainly that technical objection does not apply to a case of misdemeanor. Then we have to look to see whether it is or not satisfactorily made out that a trial which fails in this way has the effect of being *autrefois acquit*. I think it has not. There has been no trial, which is the first averment to be made in a plea of such a nature, and the party has not been in jeopardy in the legal sense of the word. In one sense the party

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has been in great jeopardy, if there is a verdict against him on a bad indictment, but not in jeopardy in the legal sense of the word. I think the party has not been tried, nor been put in jeopardy in the legal sense of the word, and I think that this part of the case was not so fully argued as the other part of the case. There have been no arguments adduced to alter the conclusion, in my mind, to which I have come, founded very much on the reasons in the judgment of Crampton, J., to which reference has been made by my Lord and my brother Wightman. I think the reasoning in that case, not only as to the part of the judgment, but as to the whole of his judgment, is perfectly convincing to my mind, and I think unanswerable, and, without repeating those reasons, I quite concur in them, and think that an abortive trial, as I said before, of this kind, does not amount to anything on which a judgment for the defendant can be prayed in a case of misdemeanor as in the case of a former acquittal or conviction. Mr. Mellish did not seem to me to meet or grapple with that part of the case, but he put it on this, that if there was anything wrong done by the judge, and put on the record, that that could be made ground of error, or of quashing the proceeding. I do not at all agree in that. There are a great many things done by the judge which I shall have occasion to refer to afterwards, which cannot be made the ground of a proceeding of this nature. It is not because the party may raise any doubt on it, upon the record, it is not because there is something done which one may not approve, or wish to see done, which necessarily gives the right to consider an abortive trial as one terminating in favour of the defendant. Now, the old notion that when there was a jury once charged with a prisoner, that jury could be the only jury to try him, has, I think, long been exploded. It was said to be first exploded, I think, in *Ferrar's* case; at all events, it has not been acted upon, according to the old notion laid down by Lord Coke, ever since *Ferrar's* case, and the contrary practice has so long prevailed that I think we cannot adhere at all to the old rule. I think we must treat it—I take the same view on that part of the case as my Lord has done when he traced the different fluctuations that had occurred in the practice—I think very strongly in favour of Crampton, J.'s notion, that this is matter of practice; it may be called in one respect a matter of law, because the practice of the court is to some extent matter of law, but whether of law or of practice it seems to me we must take the rule now to be, that the same jury ought to try the case subject to the power of the court whether it is a matter of law or practice to interfere if they see it is a proper case for interference, and I think we cannot look at the rule as a rule that we should have no such power in point of law. I have a strong inclination of opinion—it is not necessary now, perhaps, to decide that as a matter of discretion, but that the rule is that the jury ought not to be discharged unless there is some very strong reason, which, I think, is for the judge to decide on, in favour of it. It makes me incline to the notion that it is matter rather of practice than of law; and

when I say of practice, I mean in that sense in which the judges ought to adhere to and yield to, and that they may be said to act improperly if they depart from; whether a rule of law or of practice, it ought to guide the judges. Now, it seems to me, that what was complained of as mischievous in the practice adopted in the earlier times—in the time of Charles II., and probably before that—the practice complained of was an abuse of the former practice of discharging the juries, at the time when it was necessary, and that it was the abuse of the practice which was complained of, not that there was ever any doubt what the result would be if this improper practice took place. I look at the proceedings in the case of *Fenwick and Whitbread*, where this practice of discharging the juries was used in so odious and dangerous and unconstitutional a way, that it cannot be too strongly reprobated, as being taken for the very purpose, because they knew if they discharged the jury the party had not the benefit of the acquittal, and that therefore he was liable to be tried again; and I look at what Lord Holt and all the judges of England said as to this, when he said he would not discharge the jury—Lord Holt said he would wait for a time, but that he would not discharge the jury—to be founded on this, that if he did discharge the jury the party would be subject to an acquittal. Now it is said discharging the jury is the same as a verdict of acquittal. In effect, I think the very object and reasoning of the judges entering into this rule—it was a matter they entered into, the origin of the practice; it was a matter that gradually grew up—was, that the abuse of discharging juries for the purpose of getting further evidence, was a matter very much to be reprobated, but that it would have the effect of preventing the party from saying that he ought not to be tried again, and the result of such a proceeding would be to subject him to a new trial, and that, therefore, they would not act upon that. I think, with the exception of *Conway v. The Queen*, in Ireland, there have been no cases where a matter of this kind has been treated as a legal bar to fresh process issuing, or has been treated as a bar to the proceeding, or a termination of the proceedings in favour of the prisoner. All the other cases seem to me to admit of a very different answer. *Wade's* case, which was so very much relied on, was a case where the judges met, as they used to meet in those times, before the Court for considering Crown Cases was established, to consider whether anything wrong had been done at the trial, whether there had been a wrong direction given, whether they had admitted wrong evidence or refused evidence for the prisoner—any matter of that kind, which was not the ground of asking to be relieved from the consequences—in all those cases they met together, and took the course, if they had been wrong, of recommending a pardon. I do not think it has been suggested that it ever could be made matter of plea, before this case of *Conway v. The Queen*. In the case I mentioned before, the case before Lord Holt, *Perkins' case*, it is merely to the same effect—I will not discharge the jury, because it would have

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the effect, if I discharged the jury, that the party would be tried again. The true rule of law, or of practice, seems to me to have been adopted for that end. Now the modern cases since the case of *Conway and Lynch*, appear to me to be all but conclusive, at all events one case, to destroy the authority of *Conway and Lynch* as a case that ought to guide our decision—a case, I think, quite inconsistent, and in effect overruling it. In *Conway and Lynch* there are three very learned judges delivering their judgment against one. On examining the judgment and the reasons, I must own that I am entirely satisfied with the judgment of Crampton, J. In *Newton's* case a very strong opinion was given by the court, that the discharge was not equivalent to an acquittal. In that case it came before the court on a *habeas*. It is difficult in my mind to say, if the proceeding was terminated on the ground that it amounted to an acquittal, how the prisoners were not entitled to be discharged. If the proceedings were not terminated against them, I should have thought the court on *habeas* would have discharged them. I feel a difficulty in seeing that the commitment still stands. If the commitment was for murder, if the prosecution for that murder was done away with, it was the very case for an acquittal, and surely the party should be discharged. I use the case for the purpose of showing that the court do not consider themselves as concluded by the case of *Conway and Lynch*. In *Newton's* case Lord Denman says, the jury were improperly discharged, according to the argument for the prisoner, “and therefore it is contended the prisoner must be set at liberty. I do not think that conclusion follows either logically, or on the legal authorities. Even assuming that the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, nor how it could be made the subject of a plea. On this, however, I give no opinion, but merely state it by way of protestation against being supposed to have decided that it may be so pleaded.” Then he says afterwards, “I am of opinion that the judge in this case acted rightly, but even if he had acted improperly, I think it does not entitle the prisoner to be set at liberty.” That was on the ground of the original commitment. Then Patteson, J., says, “There has been no trial resulting in a verdict; what took place was not a trial determining the question of her guilt or innocence. Therefore, even if I saw great reason to doubt the correctness of what took place at the assizes, I should say she was not entitled to be discharged.” What my brother Coleridge and my brother Erle said—my brother Erle particularly—as to the discretion, has been mentioned so often in the course of the argument, that I will not further refer to them; but it does seem to me that the court there considered it at all events an open question, and Lord Denman, expressing, I think, the intimation of his opinion, that it could not be made the subject-matter of a plea, and was not equivalent to a determination in favour of the defendant of the indictment. Now, the last case on the subject, the case of *Reg. v. Drivson*, seems to me a still stronger authority.

There, as pleaded in the plea, and I think as put in the replication, there was no ground within the rule laid down and attempted to be argued by Sir Fitzroy Kelly and Mr. Mellish for the jury being discharged—certainly no ground, whether according to their argument or not, according to the case of *Conway and Lynch*. In that case it was pleaded, that the discharge took place for and by reason of no other sufficient and legal cause whatever. It is true that there is a replication put on the record, that “for a long space of time,” which we all know in pleading means no time at all—any time—the jurors retired, and not ultimately agreeing to a verdict they were discharged without having come to a conclusion. It amounts to this, that for some time—take it a long time, if it be necessary for the purpose of the pleadings—that for some long time they had not come to their conclusion, and then, because it was the last case on the circuit, none of the commissioners chose to wait any time for the verdict, which it was their duty to do—I apprehend until there was some discharge of the jury; but the commissioners did not like to wait; it was not a criminal court—it was the quarter sessions; the justices did not like to stay any longer, and being the last case they discharge the jury. That seems to me, according to the case of *Conway and Lynch*, not to be justified; but, however that may be, the court do not put it on that ground, but they put on the ground that this was a matter that cannot be made the subject of a plea. *Reg. v. Davison* was decided in a court, though in one sense inferior to this court, because a writ of error lies from that court to this; yet when we consider that it was in the place where the great criminal trials of the country take place, before a commission composed of three learned judges, with a very solemn argument on the plea, it is a case of as great authority as the Irish case. I must treat the opinion of the learned judges in *Conway and Lynch* with the greatest respect, but I think, on examining it, the one judge who differs from them gives by far the most conclusive reasons. Now, here you have a solemn argument before the three judges, and I think they decide on the very point before us, “We are all of opinion that it is unnecessary to hear further argument; the question is, whether the plea is sufficient, and Mr. Sleight chiefly relies on the case of *Conway and Lynch v. The Queen*. Now, though it has, no doubt, been laid down in the text-books that a jury cannot be discharged except under certain circumstances, it does not appear that prior to that case the improper discharge of a jury was ever made the subject of a plea. I may observe, that in that case the Irish Court of Q.B. were not unanimous, and therefore, if the necessity arose, I should consider that we were quite at liberty to review it; but it is observable that the case before them was one of felony, the present being one of misdemeanor only;” and passing over it, I will not stop to make any remark on the distinction; but it is rather a curious matter that from the very beginning, in almost every case, in every case, I think up to the time of the Revolution, it has been put in the case of life and limb, which is the same as felony, not extending to the

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case of misdemeanor, much less to the case of a proceeding in our own courts, where the parties on the one side and the other proceed in a very different manner to what they do in general criminal cases. The party here has the benefit of a new trial, and there are a great many things which do not apply to cases of felony, but certainly in Lord Holt's case, and my own notion is, that the practice adopted by the judges or growing up of itself after the time of the Revolution, has extended as a matter of practice, or as a rule by which the practice should be guided, both to felonies and misdemeanors; and I think the general rule which ought to guide judges is, that it ought not to be done except in cases of evident necessity or propriety, which seems fit to the learned judge, in cases of a criminal nature of any kind. There they say, "We are of opinion generally that where a judge has exercised his discretion, that discretion is not to be made the subject of question. It cannot be ground for error, nor can it be traversed before a jury. It seems to me, therefore, that the plea which the prisoner has placed upon the record is bad." There my brother Martin puts it entirely as a question of misdemeanor, and my brother Hill says that he adopts the position laid down by Crampton, J., in his judgment; and he also says, "It is clear that the judge has a discretion to exercise; where is the legal limit of his power to be fixed? The prisoner's counsel could not fix it. The judges in *Kinloch's* case and Sir M. Foster say it cannot be fixed. I need scarcely add that I cannot fix it." Now, I think those authorities are certainly stronger in favour of its not being a matter of plea than any case that has gone before, and I do not find it at all made out to my satisfaction—on the contrary, I think the proposition is not a true one—that such matter operates as a plea, whether it is pleaded to a new indictment or to such matter appearing on the record; the point does not operate so as to prevent fresh process being awarded, and does not operate as the termination of the proceedings, and therefore I think that, in point of law, we cannot refuse to award a *venire*, but that we are bound to award a *venire*. Then, the other part of the case which has been discussed, I think one ought to give one's opinion upon. I certainly look upon this as a rule to guide judges, which has been acted upon ever since the Revolution, and which I think ought to apply both to misdemeanors and to cases of felony, and I think it is matter of practice, or a rule of law, if you like, that the judge ought not to interfere because the case for the prosecution fails for want of evidence. I think it a most dangerous practice to prevail, and certainly it strikes me that this is a case of that description. There may be—I do not say how it would be, I think it a very nice question—I think Mr. Mellish and Sir Fitzroy Kelly both decline to say that it could not be done in a case of collusion. It would be a very nice case, but here we have no case of collusion at all; it is the same case as if a witness does not choose to come into court for some reason or other—not very different, to my mind, than if he does not answer satisfactorily. It is a failure of evidence on the part of the Crown.

Whether that be a matter of discretion or not, I think I am bound to say, as we have heard so much discussion on the matter, I certainly, for one, should have directed an acquittal. I think that the importance of the general rule is greater than the importance of justice being baffled in any particular case. It is rather put, I think, by the Crown, as if we ought to interfere, the witness being fined and behaving ill, because he was baffling justice; but unless that is brought home to the defendant, it does not seem to my mind at present to be a satisfactory distinction. At the same time, I cannot say that the whole matter being before my brother Hill, and he acting in the exercise of his discretion—certainly I can say most conscientiously having a better opinion of his judgment in such a matter than my own—I cannot say that he acted wrongly upon it. All that I should say is, that, in my opinion, as now advised in such a matter, it may be put as a mere exercise of discretion one way or the other. I would have acted on the general rule, and on the universal practice as observed by my brother Wightman since the Revolution, not to discharge the jury because the case fails for want of evidence. At the same time it is very desirable that justice should not be baffled in this way, and it is one of the defects in our trial by jury, which has often occurred to my mind, upon which we pay a considerable price for the trial by jury; it is well worth paying, but it certainly does arise from our institution of trial by jury, that very often a point arises at the trial which there is no mode of sifting, and one party or the other has the advantage of it. When trials are protracted as they are abroad, that is supplied. In our case there must be an acquittal or a conviction, and it would be a very bad practice, I think, that on the ground of there being a failure of evidence the jury should be discharged. I think the practice of discharging the jury too soon (some reference has been made as to that) is an objectionable one. It is said that it is necessary now that the rules of law are altered, and that it is necessary to discharge the jury as soon as you see they are not likely to come to an agreement. I think we ought to take some mean course as to that. Perhaps it is hardly a matter involved in the present discussion. It always seems to me very dangerous to say that in a certain time, or in a few hours, the jury would be discharged, but that they ought to be kept, not to coerce them, as put by the Lord Chief Justice, to give a wrong verdict, but such a time as to prevent their saying, "We can wait for such a time, we know we shall be let off." Therefore I do not at all reprobate the old practice of confining the jury for a reasonable time. Confining them without meat, drink and fire, and exposing them to hunger and thirst and cold, seems a very barbarous relic, which I think might as well be got rid of; but that they should be confined a reasonable time, so that they shall have time to consider, and not merely wait in order to avoid giving an unpleasant verdict. I think in our discretion we must take care to avoid one extremity or the other. I shall conclude by saying that I think that this rule is of very great importance. Certainly

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it is a rule of practice, if not of law, and I think it ought not to be departed from merely because of the failure of the prosecution in point of evidence. Without saying my brother Hill was wrong, I certainly come to this conclusion, which I think I ought to give. I think, according to my brother Wightman's notion, I should have felt myself bound by the practice to have directed an acquittal. Upon the whole, I am quite satisfied that there is no matter on this record which entitles the prisoner to ask for discharge from the indictment, or to prevent the Crown from having a fresh jury process. Therefore I think that the rule should be discharged.

BLACKBURN, J.—I also think this rule should be discharged. This is an information for a misdemeanor. Issue was joined in this court on the plea of not guilty; there is an award of jury process and a return of the Nisi Prius record, on which are entries of what took place at York. From these we find that the jury were sworn and the case commenced, but that no verdict was given, the judge having discharged the jury under circumstances stated on the record. On this the question arises, what is the court to do judicially? The counsel for the defendant contend that it is a rule of law that in all criminal cases, as well misdemeanors as felonies, when once the jury are sworn and the trial begun, that the jury must give their verdict one way or the other, unless discharged under circumstances different from those in this case, and they further contend that if this jury be discharged improperly, the issue can never be tried again, so that judgment could be given against the defendant, or their verdict found for the Crown. If they are right in their contention, I think this court ought not to permit its process to be issued for the purpose of causing a trial which could not be available, and that the defendant would be entitled as a right to a judgment refusing process and discharging the defendant from this information, the precise form of which judgment we need not consider now. But, unless the defendant is right in saying that as a matter of law the discharge of the jury operates so as to prevent the issue being decided, the Crown is, I think, entitled, as a matter of right, to an award of process to cause that trial which we must not deny. The judge at the trial has power to discharge the jury whenever it is proper, and he is the sole judge of the propriety, in this sense at least, that when he decides that the jury are to be discharged all must obey him, and the jury must be discharged. But it may well be that his order, though it must be obeyed, was improperly made; but it seems to me that, to entitle the defendant to the judgment his counsel pray for, they must show not only that the discharge of the jury under the circumstances stated on this record was improper, but also that an improper discharge of the jury is in point of law equivalent to an acquittal, and entitles the defendant to discharge as much as a verdict of not guilty would have done; and in my mind the only question which we have to decide is whether it does amount to a bar in law, and I think we must decide it. It is not sufficient for the defendant, if his counsel can

make out that there has been an improper deviation from practice, unless they show it is in law a bar by our rules of practice. I may take as a familiar example that by which a judge recommends a jury not to act on the unconfirmed evidence of an accomplice, so well established that a judge is blameable if he departs from it, and yet a conviction obtained against such a rule of practice would be good in law. In such a case, if the defendant has suffered injury, there is an equitable claim upon the Crown to redress this injury. It is for the proper constitutional advisers of the Crown to say whether such a case is made out. In *Wade's* case, Moody's Cr. Cas. 86, which was mentioned by my brother Wightman, the judges were not deciding on the law, but were consulted as the advisers of the Crown. They thought that it was an improper proceeding on the part of the judge to discharge the jury in order to postpone the trial until a witness could be educated so as to understand the nature of the oath, and I agree with them, for, as it seems to me, the evidence given after an education of this sort would be of a very questionable kind. So thinking, they recommended a pardon, but their doing so was no expression of an opinion that the course taken by the judge was beyond his power, and that he had not discretion in a fit case to discharge the jury, and as far as the course adopted by them in recommending a pardon is any evidence of their opinion, they thought it no bar at law. Here we are not acting as constitutional advisers of the Crown. We are to say whether it is legal to proceed to try this issue after what has happened. It is for the law advisers of the Crown to say whether, if it be legal, it is also proper as a matter of discretion so to do. That, however, is a question for the constitutional advisers of the Crown, of whom I am not one, to determine on their own responsibility. I have, however, no objection to state my own opinion as to the propriety of the course taken on the trial of this cause, though it is somewhat extra-judicial; that, in general it is very objectionable for a judge to discharge a jury after a trial has begun, on account of any failure of evidence. The liability to abuse is so great that I think in practice this should not be done merely on account of a failure of evidence; but I think it cannot be said that if a judge has power by law to discharge a jury, he should never exercise that power. In case of collusion, where it appears that the defendant has instigated a witness to absent himself or the like, I think a judge ought to use his power. In the present case I agree with the defendant's counsel that there is nothing stated on this record to lead to the conclusion that the defendant instigated the witness to refuse to give evidence. If there were, I should have no doubt that it would have been improper not to discharge the jury: but I think, upon the statements on this record, it is probable that the witness was not instigated by this defendant at all; still I think the judge had facts before him from which he might well draw the inference that the witness refused to answer for the purpose of defeating justice by procuring the acquittal of this defendant and the other defendants

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from the absence of evidence, thinking he could do so with impunity. I think that, under these peculiar circumstances, it was very desirable that not only should the witness who committed this contempt of court be fined and imprisoned, but also that he should be baffled in the object he proposed to himself. It may be, that the general rule that a criminal case once begun should be disposed of, is of such consequence that it would be better to suffer the wrong-doer to obtain his end than to break through this rule, and I will not take on myself to say that a judge who, acting on that notion, should in such a case as the present direct an acquittal, might not do well; but on the whole, though not without doubt, I think that my brother Hill, always supposing he had the power, did better in discharging the jury. All this, however, is in the nature of *obiter dicta*. The one point on which I rest my judgment is, that at all events in a case of misdemeanor the discharge of a jury sworn to try an issue after the trial has begun, even if improper, is not in my opinion a legal bar to a trial of the issue by another jury. I have said at all events in case of a misdemeanor, because that is the only question before us, and because the law of England undoubtedly does in favour make a distinction in many cases, and it may be in this, between the mode of procedure in felonies and in misdemeanors. The whole foundation of the argument of the defendant is rested on two passages of Lord Coke, where he expressly speaks only of felonies where life or limb is in danger, and where a privy verdict may not be given. He is silent as to the effect of an infringement of this rule, and it may well be doubted whether he was doing more than laying down a general rule of practice which he thought ought to guide the court in practice, but which was not generally followed. Before the Revolution it certainly was the practice to discharge a jury whenever the judge thought the interests of justice required it, in order that there might be a second trial. This was done in all cases of treason and capital felony as well as misdemeanor. The practice is stated by Lord Hale in pretty nearly the same terms as it is stated by Lord Chief Justice North in the case of *Whitbread and Fenwick*. Lord Hale justifies the practice for reasons which are plausible, and which show that he thought the discharge was no bar, though the acquittal might have been one. He justifies the practice, because if the jury were discharged the victorious murderer might be brought to justice, which could not have been if the discharge was a bar as much as the acquittal. But though his reasons are plausible, the case of *Whitbread and Fenwick* shows that the practice was liable to great abuse, and I think it is clear that the modern practice, by which a criminal trial is not interrupted after it has commenced, except in very exceptional cases, is very much better. I cannot doubt that a judge would most properly be removed from his office and impeached if he were now to discharge a jury under such circumstances as those under which the jury were discharged on the first trial of *Whitbread and Fenwick*. I think an Attorney-General who persevered in putting

them on trial again would also be deserving of impeachment; but supposing this to be done, I doubt whether the judges before whom the prisoners were arraigned the second time could do otherwise than tell them that they had no legal bar to the indictment even in a case of treason. After the Revolution no alteration was made by the Bill of Rights, or any other Act, in the law or practice as to criminal trials, but the practice was changed. The reaction against the old abuses was great. In *Rex v. Keete*, in 1696, a special verdict was found in a case of felony. The verdict was such that Holt, C. J., and Foster, J., thought it warranted a judgment for the Crown. Eyre and Rokeby, JJ., thought the verdict uncertain, and that a *venire de novo* ought to issue. It would appear from the various reports of the case, that there was a doubt whether there could be a *venire de novo* in a case of felony, which, as it seems to me, could only be on the ground that in accordance with the doctrine of Lord Coke in *Coke Littleton*, the jury once charged with the prisoner ought to give their verdict and could not be discharged. In the end no decision was given, as Lord Holt himself took exception to the indictment, which was quashed. This is the only case I find in which the point arises as a matter to be decided as a question of law. It was soon after this case that in *Rex v. Perkins* Lord Holt made the statement that, according to one report, "he had had occasion to consider this matter;" according to another, that all the judges of England were of opinion in debate amongst themselves that in capital cases a juror could not be withdrawn, or, in other words, a jury could not be discharged with consent, and in misdemeanor not without consent. What Lord Holt said in *Rex v. Perkins* is what in every view of the case is now approved of. The judges could by their resolution alter the practice, but not the law. It has never been decided that in felony there can be a *venire de novo* on an imperfect verdict, although the very able judgment of Crampton, J., given in *Conway and Lynch v. The Queen*, leads me to think probably it can. But if Lord Holt thought that there could be no *venire de novo* in case of an imperfect verdict on misdemeanor except by consent, his opinion has been repeatedly overruled, for I take it to be clear that on an imperfect verdict on misdemeanor a *venire de novo* is awarded (see *Rex v. Trafford*); and I agree with the reasoning of Crampton, J., in *Conway and Lynch v. The Queen*, which shows that there is no distinction in principle as to the effect of a bar of an imperfect verdict, and discharge of the jury thereupon, and any other discharge of a jury. As far as authority goes, the distinction between felony and misdemeanor here becomes important. On the authorities there is a doubt on felony. On misdemeanor I think it clear that there is a *venire de novo* on an imperfect verdict. On the argument before us it was said that there was a distinction between the discharge of a jury because the judge had become convinced that it was impracticable that they should give a verdict, which it was said was a case of necessity, and a discharge of the jury where it was mani-

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festly still practicable that they could give their verdict, but the judge thought that it was desirable for the ends of justice not to take their verdict though it was practicable. This it was said was *ultra vires* and illegal. The distinction is intelligible, but it cannot be supported without overruling *Kinloch's* case. There the verdict of not guilty might very well have been taken, though the prisoner had not the opportunity of pleading in abatement. It was entirely a voluntary act on the part of the court which led to the discharge of the jury, and, as is pointed out by Crampton, J., in *Conway and Lynch v. The Queen*, the whole reasoning of Foster, J., was founded on the supposition that the judge had a discretionary power, though he ought never to exercise it without very good reason indeed. The case of *Conway and Lynch v. The Queen*, is a case of felony, and is, so far, not necessarily in point in the present case of misdemeanor; but I must say that the admirable judgment of Crampton, J., convinces me that even in a case of felony he was right and his colleagues, though in the majority, wrong. I will not weaken what he said by repeating or abridging it, but refer to the report only, saying that I subscribe to all his reasons, except, as I have already said, I doubt whether he is justified, in treating it as settled that there must be a *venire de novo*, even on an imperfect verdict, in a case of felony. I think this still not determined by authority: (see *Campbell v. The Queen*, 11 Q. B.) Since *Kinloch's* case there have been two in England where the question arose. In *Newton's* case, 13 Q. B., Lord Denman says, "The prisoner was given in charge to a jury at the assizes, and therefore, as it is contended, the prisoner must be set at liberty. I do not think the conclusion follows, either logically or on legal authorities. Even assuming the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, nor how it can be made the subject of a plea." And Patteson, J., says, "There has been no trial resulting in a verdict. What took place was not a trial determining the question of her guilt or innocence. Therefore, even if I had great reason to doubt the correctness of what took place at the assizes, I should say she was not entitled to be discharged." These opinions were given on a return to a *habeas corpus*, when the question before the court was, whether the prisoner could be detained in gaol to abide a fresh trial. The question whether there could be a fresh trial was not so distinctly raised as in the present case, but it was before the court, and the two learned judges just quoted evidently thought that, even in the case of a capital felony, an improper discharge of a jury was not equivalent to an acquittal. The last case on the subject is *Reg. v. Davison*, where the precise question now before us was raised on demurrer at the Central Criminal Court. There, to an indictment for a misdemeanor, it was pleaded that the prisoner had been given in charge to a jury and had been improperly discharged by the justices. The replication stated no more than that the justices did it in the exercise of their discretion,

because all other business was at an end, and the jury said that they were not likely to agree. This was admitted to be true by the demurrer, and if there was no more than that stated, surely the discharge was indiscreet and premature. Both Pollock, C.B., and Martin, B., take the distinction between the case, which was one of misdemeanor, and that of *Conway and Lynch v. The Queen*, which was felony; but they rest their judgment on the more general ground that the improper discharge of a jury could not be the subject of a plea. I think those authorities quite sufficient to authorise us to decide that the discharge of the jury is no legal bar to another trial, and therefore that there ought to be such jury process as is necessary to produce the further trial. Whether that is to be entered on the record as a *venire de novo*, or as a continuation of the former jury process, is a matter not now before us. The rule should be discharged.

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COURT OF EXCHEQUER.

November 22 and 26, 1861.

(Before POLLOCK, C.B., BRAMWELL, CHANNELL, and BB.,)

RE WILLIAM THOMPSON. (a)

*Aggravated assault—16 & 17 Vict. c. 30—Charge of rape—
tion of magistrates—Habeas corpus.*

Where an information charged a prisoner with having assaulted and abused a woman, and after a discussion by attorney for the prosecutrix, the attorney for the prisoner and justices, it was agreed not to proceed with a charge of rape and information, but to proceed under the Aggravated Assaults the only evidence of the assault was that given by the prosecutrix, who swore that the prisoner violated her person against and the magistrates thereupon convicted the prisoner of an assault under the 16 & 17 Vict. c. 30, and sentenced him to six months' imprisonment:

Held (per Pollock, C.B. and Wilde, B.) that an assault with intent to commit any other offence is itself an offence distinct from common assault. That by 9 Geo. 4, c. 31, and 16 & 17 Vict. c. 30, magistrates have jurisdiction over common assaults only. That jurisdiction depends on certain facts being proved or not proved, and that the decision of the magistrates as to the proof of those facts is final, but that the court will consider the facts so as to determine whether the nature of the charge before the magistrates; and that on this case the magistrates had exceeded their jurisdiction by proceeding on a charge of assault other than a common assault:

Held, contra (per Bramwell and Channell, BB.), that in point of law a charge of assault only was brought before the magistrates, it was not competent for the court to review the evidence on which the decision of the magistrates was founded.

WILLIAM THOMPSON was convicted of an aggravated assault upon a woman under the 16 & 17 Vict. c. 30, and committed to Preston gaol for six months.

The information, which had been drawn up by the magistrate, clerk, who was a layman, charged the defendant Thompson

(a) Reported by F. BAILEY, and S. M'CULLOCH, Esqrs., Barristers-at-law.

"unlawfully assaulting and abusing the complainant;" and when the attorney for the prosecutrix proceeded to charge the defendant Thompson before the magistrates with having committed a rape, it was objected for the defendant that the information did not charge him with a felony; and after some argument between the attorneys and the justices, it was agreed that the case should be taken under the Aggravated Assaults Act. The only evidence of the assault was that given by the prosecutrix herself, who distinctly swore that the defendant had committed a rape upon her.

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The commitment stated "That, whereas William Thompson, of Oswaldtwistle, county of Lancaster, to wit, manager of a cotton factory, was duly convicted before two justices of the peace, upon the information and complaint of Susannah Taylor, of Belthorne, in the township of Oswaldtwistle, single woman, for that the said William Thompson, within three calendar months last past, to wit, on the 29th Oct. 1860, at the township of Lower Darwen, in the lower division of the hundred of Blackburn, in the said county of Lancaster, did unlawfully assault and abuse the said Susannah Taylor, contrary to the statute in such case made and provided; and the said justice did find the said assault to be proved, and to be of such an aggravated nature that it could not, in the opinion of the said justices, be sufficiently punished under the provisions of the stat. 9 Geo. 4, c. 31, and the said justices did therefore, in pursuance of the statute passed in the sixteenth year of the reign of her present Majesty, entitled, 'An Act for the better prevention and punishment of aggravated assaults upon women and children, and for preventing delay and expense in the administration of certain parts of the criminal law,' adjudge that the said William Thompson for his said offence should be imprisoned in the house of correction at Preston, in the said county, for the space of six calendar months."

Under these circumstances a rule *nisi* had been granted calling on the justices to show cause why a *habeas corpus* should not issue to bring up the body of the said William Thompson, on the ground that the justices had no jurisdiction in the matter.

J. Kaye now showed cause.—It was contended, first, that the conviction was not before the court, but only the commitment, and that being regular and good upon the face of it, being drawn up in accordance with the forms in *Jervis's Act*, would be a sufficient return to a writ of *habeas corpus*, and that the court could not, as the conviction was not before them, inquire into the evidence upon which the justices acted. Secondly, the question as to the degree and sufficiency of evidence and the credit due to witnesses is a matter solely within the discretion of the magistrates, and the court will not interfere unless it appear that there was no evidence whatever to support the conviction: (*R. v. Bolton*, 1 Q. B. 66; *Paley on Convictions*, 107.) In this case there was clearly sufficient evidence of an assault to support the conviction, and the fact that further evidence was given tending to show that a rape had been

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committed does not invalidate their decision, as not only were they confined to the offence stated in the information, but it might well be that they were satisfied with the evidence of the assault, but not satisfied with the evidence of the more serious offence. Thirdly, that the word "abuse" in the information did not necessarily mean "ravishing," and that prefixing the word "unlawfully" showed that a misdemeanor was intended. Fourthly, that supposing the information was for a rape, and the evidence only made out an offence included in but not amounting to the felony, the magistrates were justified in convicting for the lesser offence.

Overend, Q.C. (Wheeler with him) in support of the rule.—The information meant more than a common assault, and the employment of the word "abuse" gave notice to the magistrates of the more serious charge (18 Eliz. c. 7, s. 4), and the evidence of the woman pointed to rape or nothing. No private arrangement between the parties could give the magistrates the right to adjudicate in such a case; they should either have committed the prisoner for trial or have discharged him. Even if they did not consider that the charge of rape was established, it was evidently either an "assault with intent," or at least an indecent assault; and in either case their jurisdiction was ousted: (14 & 15 Vict. c. 100, s. 29.) By 9 Geo. 4, c. 31, justices were empowered to deal summarily with common assaults; and by 16 & 17 Vict. c. 30, they are authorised to inflict a more severe punishment for aggravated assaults, but that gives them no power to deal with charges of rape, assault with intent, nor with indecent assaults. If the word "abuse" took the case beyond an aggravated assault, their summary jurisdiction was at once ousted: (22 & 23 Vict. c. 17.) *Cur. adv. vult.*

Nov. 26.—POLLOCK, C.B.—In this case an application was made the other day by Mr. Overend for a writ of *habeas corpus*. Cause was shown, and Mr. Overend and Mr. Wheeler were heard in support of the rule. The court being equally divided the rule will be discharged; but it is right, perhaps, shortly to state the grounds on which it appears to me that the writ ought to have issued. It appears that the conviction and commitment were under the 16 & 17 Vict. c. 30, by which magistrates are empowered, if they think an assault to be of an aggravated character, to extend the imprisonment that may be inflicted under the 9 Geo. 4, c. 31, from three months, which that statute empowers, to six months, which the magistrates may award under the 16 & 17 Vict. The objection to the conviction and the warrant founded upon it was this, that the magistrates have exceeded their jurisdiction; and it appears that their jurisdiction is founded upon this: by the 9 Geo. 4, if complaint be made of a common assault (the statute does not say an assault merely, but it says a common assault), if complaint be made of a common assault, the magistrates have a right to deal with it, and to award to the party found guilty of a common assault any term of imprisonment not exceeding three months. It may be material to consider, what is the mean-

ing of the expression "common assault." It appears to me that it means an assault not accompanied by any circumstances that give to the assault the distinct character of an offence recognised by the law as something more than an assault. I certainly cannot understand that expression to mean anything else. The assault may be accompanied with a violent killing, and then it would be manslaughter or murder; an assault may be accompanied with violation of the person of a woman against her will, and then it would be a rape; it may be accompanied with circumstances that leave no doubt of an intention to commit a rape, it would then be an assault with intent to commit a rape; it may be accompanied with circumstances that show that there was an intention to kill, and an assault with intent to commit a rape is only a misdemeanor, it is not a felony; but an assault with intent to kill is to this hour a capital felony. It may be an assault for some other purposes, which it is not necessary to repeat here now. Thus it may either be a capital felony, or a felony, or nothing but a misdemeanor; but, in my judgment, an assault with intent to commit a rape is as distinct an offence from a common assault as murder is distinct from rape. They both are distinct from an ordinary assault, or an assault for a purpose not amounting to felony, but yet going beyond a common assault, and the circumstance of that being an assault (as a common circumstance in all these cases) does not identify the two crimes so as to make them more or less of the same class of offence. That is an assault with something beyond; but still, having taken that away from the assault, in my judgment there is as much distinction in point of law between a common assault and an assault with intent to commit a rape as there is between larceny and perjury, and I do not think that it was ever intended that they should be confounded together. Well, then, the statute of the 9 Geo. 4, having taken means to limit the authority of the magistrates to inquire into a common assault, in my judgment this authority is not extended by the 16 & 17 Vict., which although it does not repeat the expression "common assault," and speaks merely of an assault, but of a more aggravated character, refers back to the power of punishment under the 9 Geo. 4, and says, if the assault is of so aggravated a nature that the magistrates think the powers of the 9 Geo. 4 not sufficient, they shall not be limited to three months, but may award imprisonment for a term not exceeding six months, with or without hard labour. It appears to me that, under these provisions of the Legislature, the magistrates have no authority except to inquire into a charge of common assault; that when that charge is made for any other aggravated assault distinguished by the law and marked out for a different mode of punishment, they ought to hold their hand and send the case for trial at the sessions, if the sessions be competent to inquire into the offence, or at the assizes, if the offence be of such a nature that it ought to go there. Then the question that I have to put to myself, in point of fact, with reference to these proceedings is this, What was the charge made before the

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magistrates? If it was a charge of common assault, they have jurisdiction; if it was a charge for an assault of a different character, they had no jurisdiction. The case of *Rex v. Bolton* is a very able summary of the law upon this subject, and it points out with remarkable precision, in my judgment, the occasions on which the questions of jurisdiction must be left entirely to the magistrates. There are cases where the jurisdiction depends upon certain facts being proved or not proved. Where that is the case, if the magistrates have dealt with the fact as being proved, and have exercised a jurisdiction upon that footing, no court can inquire into their authority. Their decision upon the fact is conclusive with reference to any question of appeal, or application to any court whatever. But when the nature of the charge is undoubted, and it turns out that the charge is not a charge which gives them jurisdiction, then it appears to me neither *Rex v. Bolton* nor any other authority prevents the Superior Courts in Westminster-hall from entertaining the matter and looking at the evidence. What was the charge that was really made on the present occasion? The information states that the charge is for assaulting and abusing a certain woman. The complaint is, upon the face of the information, something more than a mere assaulting. The very expression (for the information was in writing) appears to me to import assaulting and something more; but when one hears the evidence, it seems to me that every possible doubt must be removed, and I think the Court of Queen's Bench, before whom this matter was brought, and who did not grant a rule to show cause upon this part of the case, were not in the position in which we are; for we have had, in addition to the rule to show cause, affidavits filed on the part of those who support the conviction and the warrant, and who resist the rule for the *habeas corpus*; we have a statement made distinctly of all that took place before the magistrates, and there the information being for an assault, and clearly something more, called abusing, it appears to me that the moment the complainant had to give her evidence, she forthwith detailed a complete case of absolute violation of her person against her will. It appears to me that, without entering into any very nice inquiry as to what is the meaning of the word "abuse," there are very strong grounds for thinking that the word "abuse" as applied to a woman—and I am not aware that in any case it has been used except with reference to sexual intercourse; certainly it has in more than one Act of Parliament had that meaning applied to it—that the term "abuse" apparently always imports something of that nature. Well then, we have those facts; the information is for assaulting and abusing, and the evidence has disclosed on the part of the complainant a statement of facts that constitute a complete violation of her person against her will. Can any one say that that was a charge of a common assault? I think it was not. If there was no charge of a common assault made—if there was no evidence of a common assault, that is, merely a common assault—in my opinion the magistrates had no jurisdiction. It, however, may be

suggested that that is a decision of the magistrates in point of fact, and conclusive with us, which I admit it to be where the mere question of truth or falsehood of the facts is to determine the matter; and it may be said, "Oh, they believed the woman as to the mere assault, but disbelieved every other part of her story, and they disbelieved it was either an actual rape, or an attempt to commit it." But it appears to me that would only be trifling with what I think it is our duty to take care of, namely, that the magistrates do not exceed their jurisdiction, and exercise a power of sending one of her Majesty's subjects for six months to prison, and possibly with hard labour (though hard labour was not given in this case), the effect of which would be to put an end to all further inquiry about the rape, which, after the judgment of the magistrates, you would have no right to deal with. They cannot in substance pardon it by treating it as a common assault and disbelieve the woman. In my judgment, therefore, their duty was to have sent the case to be tried at the assizes, and to have held their hands with reference to any supposed jurisdiction of their own. I own that it appears to me that I should be ascribing to the magistrates a course of investigation which I cannot bring myself to believe to be the truth. It appears to me that the moment it came out that the charge of assault was accompanied by this charge of rape, it was the duty of the magistrates instantly to say, "No consent of the defendant will give us jurisdiction; we have no right to deal with that matter at all. We will stay our hands and the party must take his trial at the assizes." Instead of that, the magistrates appear to have sentenced the party to six months' imprisonment—they certainly did not give hard labour, though if they had believed the woman it was difficult to say that they ought not to have done so; but it is a very unintelligible proceeding to say that they believed the woman so far as to the assault, and they utterly disbelieved her with respect to the rape, or any attempt at rape. And therefore, as they cut it all down to a mere common assault, they had jurisdiction to deal with that under the statute. I own, with the profoundest respect for my brethren who do not entertain the same opinion as myself, I cannot help thinking that it borders on trifling with our duty to apply the decision in the case of *Rex v. Bolton* to such a state of things. I cannot bring my mind to believe that the magistrates acted under any such notion of their duty or their rights. I cannot believe that they acted as they did because they believed the woman as to the assault, and disbelieved her as to the rape. If they disbelieved so material a matter, and they thought she was swearing falsely, I think they would have dismissed the matter altogether, and not have sent the man without a trial by a jury to an imprisonment for six months. Thinking therefore, as I do, that there was no charge of a common assault—that the charge was really of a distinct, substantive and different offence, namely, a charge of rape, or at least an assault with intent to commit a rape, both of which are entirely distinct from the charge of assault, and thinking that

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the magistrates had no right when that charge was made to give themselves jurisdiction by believing a part of the case and disbelieving the remainder—in my opinion the writ of *habeas corpus* ought to go; at all events, we ought to have the man here, and have it fully argued before us whether that conviction and the warrant of commitment can be sustained in law.

BRAMWELL, B.—I regret that my opinion should be adverse to that of my Lord, because I would rather this court should be agreed: but I think this rule should be discharged. A preliminary objection was taken by Mr. Kaye that the conviction was not before the court, which I advert to only to show that it has not been passed over, and it is not to be supposed that we take it to be ill-founded; but the matter having been discussed upon the other point, and I being prepared to express an opinion upon it favourable to Mr. Kaye, it is not necessary, as far as I am concerned, to entertain that preliminary objection, or to determine whether it is well founded or not, and it is not to be supposed that we say it is not. Now, assuming that the documents before us are sufficient upon the face of them to warrant the detention of the prisoner, inasmuch as he would upon their being returned have to be remanded, unless he could show a want of jurisdiction, the question whether this rule should be made absolute seems to me to be a question of whether or not it is shown that the magistrates had jurisdiction. As my Lord has put it—and I go entirely along with my Lord in his reasoning, for the purpose of showing what the jurisdiction of the magistrates was—I think they had no power to convict this man in the way they have done, except upon the charge of an offence of which they have convicted him. That seems to be a truism; but the reason I make the remark in that way is, that, though no doubt cases may occur where a particular charge being brought against a man, and it turning out he is not guilty on that charge, the magistrates have not jurisdiction to entertain the one of which he is guilty, yet it not being necessary, as it was not necessary in this case, that there should be an information in writing, the magistrates, no doubt, instead of going through the form of solemnly dismissing the first charge, and asking the parties to go into a new charge, and make their statements over again, may say, "The offence is not proved, we dismiss it, and such another charge is preferred, and we convict on that;" that is possible; but in point of form they ought to dismiss any charge brought before them if not well founded, and separately entertain another. In this case the question, to my mind, is, whether a charge was brought before them of an assault? Because, if it was competent for them, and they were bound to hear it, to entertain and determine it; and if they did determine it, and it was made out, it seems to me that we have no power to investigate the propriety of their proceedings. Therefore, to my mind, the question is whether a charge was brought before them of a character of which they could convict the defendant? And I go along with my Lord in his reasoning, that if it had been a charge

of rape they ought not to have convicted him of this offence, and ought to have dismissed the charge. So also I am inclined to think, if it had been a charge of any of the assaults which my Lord has referred to, which are not common assaults, they ought to have dismissed the charge. Again I say, therefore, the question to my mind is, whether the charge was a charge of the offence of which they have convicted him? and I think it was. The written complaint was that the prisoner had assaulted and abused the female who made the complaint. I confess, to my mind, the word "abuse" has no meaning; it is not a word of art, it is not a technical word, except in a different sense to that which has generally been imputed to it in popular language; it may mean either to call names or abuse by words; perhaps, correctly speaking, it means any private misuse in office, or a man abusing his powers; and other instances might be shown. It is also very possible that magistrates may abuse their power when cases of this description are brought before them—that is, misuse it. The only way in which I find it used as a term of art is in a way which, to my mind, shows it does not mean ravish; because I find it used in a statute in this way:—The 16th section of 9 Geo. 4, c. 31, says: "Whereas on trials for the crimes of rape and the carnally abusing girls under the respective ages herein mentioned;" that is to say, on charges of rape and on charges which are not charges of rape, but "carnally abusing" young females. There, to my mind, the word abuse is manifestly used as different from the word rape: it may include rape no doubt, or it may not; yet the statutes, particularly the 9 Geo. 4, c. 31, s. 16, enact, "That if any one shall unlawfully carnally know and abuse," that is unlawfully carnally abuse, whether with or without consent, there may be an abusing, although no rape. To my mind, therefore, this word, without the proper concomitants "did carnally know," and "unlawfully and carnally," really has no meaning at all. If I take it to have any meaning, I should say it had the meaning which at first sight one would suppose it indicated, that the female was under age; and, in point of fact, with reference to this particular woman, it seems to me to be meaningless. But then the only expression used is, "the defendant did unlawfully assault her," together with words which may or may not mean he did something else, but which in my mind have no definite meaning. I think, therefore, that upon the written information before the magistrates there was nothing to preclude their entertaining a charge of common assault, though they would have been precluded if it had been said he feloniously assaulted with intent or attempted to commit a rape, or any of the other offences that are not common assaults. Well, that being the written information, and that being the written charge, was there anything else to show that the magistrates believed there was any ambiguity about it, and that the charge was one of rape? I refer to the charge, independently of the evidence, for a reason that will appear presently. Now, the only other statement of any charge we have had before us is

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the charge in the opening of the prosecutrix's attorney, who undoubtedly began by saying he made a charge of rape, and on that an objection was taken by the opposite party, "You cannot go into that, because the written charge which we are called upon here to investigate is not a charge of rape." But the affidavit of the prosecutrix's attorney says: "I agreed to this; and I think it was agreed to, and we went into a charge of a common assault;" which my brother Channell said, as I thought very properly, in the course of the argument, is the charitable construction; not that at the end of the evidence the justices did what they ought not to do, and agreed to suppress the charge of rape and go into another which they had proper jurisdiction to go into; but that they agreed to take the charge of common assault under the belief that the objection of the prosecutrix's attorney was well founded. I think this is not only a charitable way of looking at it; but I think a more correct verbal construction of the affidavits, because the attorney says not only "do not go into the charge of rape," but he says, "go into a charge of assault, if you please." I cannot say I object in point of law, that the justices could not do that; for, though the objection was founded on ignorance, the justices acted on it, and after the objection of the prosecutrix's attorney to the charge of rape the charge preferred was of common assault, and not a charge of any of the statutory assaults to which my Lord has referred, as to which I confess I agree that if there had been such a charge it would have been wrong for the magistrates to convict of the offence, and they ought, at all events, specifically to have dismissed it if they did not think it well founded, and then entertain the new one to be brought before them of a common assault. However, by this process of reasoning, I have brought myself to the opinion that the charge made before the magistrates was a charge of an assault, and one which they were competent under the statute to entertain. That being so, to my mind there is an end of the case; because, if they were competent to entertain it, it matters not that it was not supported by evidence on which they ought to have acted; it matters not that there was abundant evidence on which they ought to have come to an opinion that an offence had been committed over which they had no jurisdiction. Although I think it is incompetent to us to look into the evidence, and to say in what way they ought to deal with it, I cannot help subscribing to a considerable extent to a remark my Lord has made, that it was in some way trifling with what we may call the real merits of the case; because one cannot fail to perceive that, though we cannot, in my judgment, review their proceedings, they ought to have come to a different conclusion. It is possible in point of law, though I do not suppose it was so in point of fact, that they may have discredited that a rape was committed, and may have found that nothing but an aggravated common assault was committed. It was asked in the course of the argument how it was possible, if the woman's statement could be to any extent believed, there could be an assault of this description, unless with

an attempt to commit a rape, or unless it was some other than a common assault? My answer is this: I take it to be perfectly possible, in point of fact, that a man might violently lay hold of a woman and insist on kissing her; that would subject him to the consequences either of an attempt to ravish, an assault with intent to actually rape, or an aggravated assault; and on her resisting he might strike her; that would be an assault, and it is possible in point of fact, that such an assault given in evidence may have satisfied the magistrates that a common assault of an aggravated character was committed, but no statutable assault, no felony was committed or proved. Now, the question is, whether we have jurisdiction to look into it; and on that matter I entertain some doubt, the impression on my mind being, that if they had the charge before them, on which they convicted, whether there was or was not evidence of that charge is a matter which they must determine. They determined there was sufficient evidence for a conviction, and the impression upon my mind is, that we cannot review what they have done. Accordingly, on that ground I think there was no want of jurisdiction shown, and if the prisoner were brought up he would have to be remanded. I think the rule ought not to be made absolute, because I cannot see that there would be a more solemn discussion upon the return after the expense of bringing the man up than there has been upon the present occasion. I may say that another thing that influences me is this, that if my opinion is not well founded, it is a satisfaction to know that a court of co-ordinate jurisdiction has unanimously expressed an opinion, and I think not an ill-founded one, with respect to the decision of this particular matter. For fear I should be misunderstood—for fear it should be supposed I think the magistrates did right in point of fact—I wish to make this observation. I am not going to censure them—I dare say they thought they were warranted in doing what they did in point of law and expediency; but in my opinion they were wrong. I think they were clearly so. One of the effects of what they have done is to pardon this man, for I believe no further proceedings could be taken against him for the rape.

POLLOCK, C. B.—In my opinion, in point of law, that is so. The statute expressly says no action shall be brought, and no further proceedings of any sort taken in respect of that assault.

BRAMWELL, B.—But be that as it may—whether it has that effect or not, or whether this man can still be tried for the offence of rape, is not the question before us to-day. It is utterly impossible that they can have credited the case of the prosecutrix without thinking that a rape, or an indecent assault, or an attempt to commit a rape, had been committed—it is utterly impossible they could have done so; because, when one comes to examine into the evidence, the cross-examination of the prosecutrix was not for the purpose of showing that one of the ingredients of rape had not taken place, and that there was not an assault of such a character

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as to support the statement that penetration had taken place—that there had not been an attempt to commit a rape, or an indecent assault—but the cross-examination was solely directed to show that the thing was done with her consent. I should conceive upon the evidence the only doubt the magistrates had, or ought to have had, was not whether the offence she stated had not been committed in the other particulars, but whether she was a consenting party to what took place or not. If that was so, when they came to decide the case, the first thing they ought to have made up their minds to was, is the defence a true one—or the case a true one? If the case on the part of the prosecutrix is a true one, namely, that she did not consent, they were evidently bound to commit him for trial on the grave charge to which she had sworn, or, at all events, for one of the statutory assaults, if they had any reason for doubting that penetration had taken place. If on the other hand they believed the case of the defendant, that what was done was with the consent of the woman, it is obvious they ought not to have convicted him in the way they have done. The only question really raised by the parties is, whether what took place was with or without the consent of the prosecutrix. And, in my opinion, all they ought to have done, and what in point of law is all they could do, was to determine that question in their own minds; and if they came to a conclusion that it was with her consent, they ought to have dismissed the summons; if it was not, then they ought to have sent him for trial for the offence with which he was charged. That appears to my mind plain. I really cannot understand that there is any doubt about it. I cannot refrain from saying that it is an inexpedient thing that magistrates should take on themselves, from any notion of expediency or otherwise, to say, “We will not commit this man for trial for the offence sworn to against him, because he may be guilty of another, or perhaps it may go off on this, that, or the other; or to save expense, or what not.” What they ought to do, without reference to the consequences, is to adjudicate on the evidence before them, and if that satisfies them that the offence charged is committed, and no other, they ought to convict, as they must have done in this case; if they are satisfied a different offence is committed they ought not to have convicted him at all. Although therefore I am of opinion that the charge was such that they could convict of the offence of which they have convicted, and we cannot reverse what they have done, I also agree with my Lord—I repeat, in order that there may be no mistake about it—that it was clear from this evidence that they ought not in point of fact to have come to the conclusion they have done, but they ought to have disposed of the summons or sent the man for trial. We cannot, however, interfere with their proceedings, and this being my opinion, I think this rule should be discharged.

CHANNELL, B.—I concur in the expression of regret that has fallen from the rest of the Court, that there should be a difference of opinion upon this subject, particularly as the liberty of the

subject is concerned. After having given the case the best consideration I am able, I concur in the view which my brother Bramwell has just stated, and I think that no rule should be drawn up in the nature of a rule absolute. It seems to me the question is not as put by the Lord Chief Baron and my brother Bramwell, whether the magistrates acted wisely or discreetly; that is not at all the question. As that is not the question, I would rather not upon that point express any opinion. The question is, whether the magistrates had jurisdiction or not; if they had jurisdiction, I think we ought not to interfere, and say they have come to an erroneous conclusion. Now I agree as to the necessity of inquiring into the facts in some cases in order to ascertain whether the jurisdiction exists or not; but in this case all the facts are proved which give jurisdiction. But it is said, in course of proving those facts something else came out in the course of the evidence which destroys the jurisdiction. I do not think the magistrates are bound to credit the evidence of witnesses to the full extent; they were at liberty to believe or disbelieve part of the evidence, and if adopting the rest of the evidence the case was left within their jurisdiction, they had a right to exercise that jurisdiction. And this case differs from *Rex v. Bolton*, in which the complainant had himself done something which in terms destroyed the jurisdiction of the magistrates. The magistrates who convicted under the particular statute found the fact to be as admitted, and by admitting the case to be true it took away the jurisdiction. The question then is, what is the jurisdiction that arises under this statute? The information is laid under the 16 & 17 Vict. c. 30, and the objection is not that the magistrates have not found in terms that there was such an aggravation of the assault that it could not be sufficiently punished under the 9 Geo. 4, but that they found the complaint stated in the information to be true, and it is said the complaint stated upon the information is one that took away the jurisdiction of the magistrates. The complaint is that "William Thompson did unlawfully assault and abuse one Susannah Taylor." I think the word unlawfully may be connected with the assault and go to negative any assault of a felonious character. By the use of the word abuse it is said that the jurisdiction of the statute given by the 16 & 17 Vict. is taken away. I confess I cannot come to that conclusion. I am called upon to put, if I can, a construction on the word "abuse." It may be surplusage, or it may mean something. I do not think it can be reasonably treated in the sense that opprobrious epithets were used, and that the assault committed was the more aggravated because it was so accompanied. I think it must be treated as meaning some abuse of the person, which abuse of the person does not amount to more than this—there may have been an assault and some indecency committed with regard to the person of the complainant. I own I am unable to come to the conclusion that the assault is not an aggravated assault within the meaning of the 16 & 17 Vict. c. 30, because it

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is also an indecent assault; it may be the indecency may be the very aggravation connected with the assault which gave the magistrates jurisdiction, and yet stop short of any statutory charge. If this had been a charge of rape, I agree with the rest of the Court that the jurisdiction is entirely gone; but when I do agree, I do not put this case on the ground of any agreement to give the magistrates jurisdiction. I utterly repudiate that; at the same time I think, on reading the affidavit, that was not the agreement come to. The affidavit is drawn up in a very loose way, and the information was framed in a very loose way. It appears to me that the practitioner who framed the information and the affidavit did not rightly understand what he was about. I understand the true meaning of the affidavit to be, that an objection was taken that the magistrates had no jurisdiction—that it was a charge of rape, and that was acquiesced in. The prosecutor went on then only intending to prefer a charge not commensurate with the charge in the information. The 16 & 17 Vict. c. 30 gives the magistrates jurisdiction in cases of an assault, if it shall appear to be such an aggravated assault that it cannot be properly punished under the 9 Geo. 4. The words are “an assault;” that is the only expression in this statute. In the 9 Geo. 4 there are the words “common assault” used; but there is no such word common in this. What is to give the magistrates jurisdiction? Is it that the assault is an assault of an aggravated character? In my opinion the aggravation may consist of indecency, stopping far short of anything like an intent to abuse the person in the sense in which the term is understood. For these reasons it appears to me, if I am to consider the question of jurisdiction only, there is nothing in the materials brought before us that can enable us to say the magistrates have acted illegally and have exceeded their jurisdiction. I distrust my own opinion, as being in opposition to my Lord Chief Baron and my brother Wilde; but my brother Bramwell concurs in it, and I may add that it is some consolation that, though the matter was not fully argued in the Queen’s Bench, I find the judges in that court refused the application for a rule *nisi*.

WILDE, B.—I am of opinion that this rule ought to be made absolute; and I may say I entirely agree with every word that has fallen from the Lord Chief Baron, and if it were not a case of considerable importance in its several bearings I do not know that I should add anything to what has fallen from him; but seeing that the court is divided in opinion, and seeing the question raised here is one which could not be otherwise than of very general interest, I propose to add a little to what has been already said. Now, the prisoner William Thompson has been convicted before two justices sitting in petty sessions of an aggravated assault, and sentenced to six calendar months’ imprisonment. The question is whether under the circumstances the magistrates had jurisdiction to deal with him in that manner. The first question that arises is, what is their jurisdiction under the act of Parliament under which alone

they had power to deal with this matter, by the 9 Geo. 4, c. 31, and the subsequent statute of the 16 & 17 Vict. c. 30? Now, the 9 Geo. 4, c. 31, enumerates a variety of assaults differing from what may be called common assaults. It enumerates assaults with intent to commit felony; assaults on police officers or revenue officers, and any person acting in aid of officers; assaults with intent to resist capture, or any assault committed in pursuance of a conspiracy. It contains assaults of a peculiar character, for which the court before whom it is tried, if they think fit, may award an imprisonment for a term not exceeding three months. I merely mention that for the purpose of pointing out that what the statute recognised in point of law was what may be called an assault of an aggravated character, which was subject to imprisonment of a more than ordinary character; but no power is given to two magistrates sitting in petty sessions to deal with an intent to commit a felony. And, having mentioned these assaults, the statute goes on in a section further to say this, "And whereas it is expedient that the summary power of punishing persons guilty of common assaults and batteries should be provided under the limitations hereafter contained." It then goes on to confine to justices in petty sessions the power of dealing with common assaults and batteries. And section 29 says, in so many words, in case the justices shall find the assault to have been accompanied by any attempt to commit felony, then they are not to have the jurisdiction given before. Nothing can be plainer than that, under this act of Parliament, justices sitting in petty sessions have power to determine summarily cases of common assault and batteries; it is not competent for them to determine assaults of a different description. Now the jurisdiction has been altered by the statute that follows, the 16 & 17 Vict. c. 30, and it says, where any person shall be charged before two justices of the peace sitting in petty sessions with an assault on any female whatever or a male child, and it shall be of such an aggravated nature that it cannot be sufficiently punished under the provisions of the 9 Geo. 4, then they are to have the power, instead of imprisoning for three months, which the 9 Geo. 4 imposes, to imprison for six months. Now I cannot read the section as meaning anything more than this, that where a question arises which would be within the jurisdiction under the 9 Geo. 4, that is to say, where a person is charged before two justices in petty sessions for having committed an assault, and it turns out that the assault, though a common assault, was accompanied with such details of cruelty and violence as not to be sufficiently punished, under the 9 Geo. 4, by three months imprisonment, they are to have the power to imprison him for six months; and this act is the act commonly called the Wife Beating Act, which was introduced in consequence of aggravated assaults of violence and cruelty that were found to exist. Though the statute gives jurisdiction, it is a jurisdiction given to deal with common assaults only, as I read it, and to increase the punishment if the common assault is accompanied by circumstances of an aggravated character. Now that being so, the next point

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that arises is, what was the matter that was brought before the magistrates on the occasion in question? First, there is the information; and then there is the fact that *Rex v. Bolton*, decided in the Queen's Bench, expressly recognises the principle that in order that the superior courts may judge whether the magistrates have jurisdiction, they may deal with the facts of the matter on affidavit. Now, as to the information. The charge is of an assault and abuse; and I am certainly not prepared to say that the word "abuse" must generally have meant a charge of violation. If it turned only on the question of the meaning of the information, I should have very serious doubts about the matter, and I should not, as at present advised, be prepared to come to the opinion that it necessarily meant rape. I think it is capable of the meaning that the Lord Chief Baron has pointed out. Wherever it has been used in the statutes it has had reference to sexual connection, and nothing else. But then there is a great deal more than the mere charge in the information. I consider the case of *Rex v. Bolton* entitles us to look into the facts and the evidence that has been brought before us; and the magistrates have with great propriety, on the affidavits in answer to this rule, brought the general matter before us. We are now no longer at all in the dark as to how it was and of what it was this man was convicted. It appears to me, without going into the evidence, as my Lord Chief Baron has disposed of that—it appears, when the evidence was laid before the magistrates, there really was evidence of a rape or nothing at all. The assault complained of was preceded by some gross language, which pointed at nothing else than an attempt to violate the person of the complainant; the assault which followed had no connection with anything except an attempt of that character. There was no beating, no violence beyond the violence that belonged to an attempt of the character I have described. That was the nature of the evidence. Now what is the duty of the magistrates? I do not at all mean to deny that, though there may be evidence, and even strong evidence, of one species of offence over which the magistrates have no jurisdiction, still that the magistrates are entitled, if they please, to disbelieve the evidence, and come to a *bonâ fide* conclusion that a less offence is committed, namely, that with which they are charged to deal by the statute of Geo. 4. I do not think it is competent for the superior courts to examine such a decision; the common sense of the matter is, they are to consider the facts, and deal with the case; and if the court were satisfied that the magistrates had ignored, in point of fact, the fact of rape, and the intent to commit a rape, and *bonâ fide* came to the conclusion that all that had happened was a common assault, I should then be of opinion that they had done perfectly right, and that there is no ground whatever for this rule. But it is precisely because I am satisfied that that is not the case, that I think the rule ought to be made absolute. I ground myself in this opinion on the evidence, and after hearing the opinions of my brothers Bramwell

and Channell, I agree in the view the Lord Chief Baron has come to. In the opinion of anybody who reads the evidence, it clearly shows a charge of rape. But I do not ground myself on that alone. I look to the affidavit the prosecutrix's attorney has made in this case, and in the affidavit we find a perfect solution to my mind of the matter—showing how the man has been convicted of a common assault, and sentenced to six months' imprisonment, when the woman who is said to have been assaulted has received no violence whatever. It appears an objection was made, when the case came on, that the magistrates had not power to deal with it, it being one of rape; and the attorney says: "After some argument between the attorneys and the justices before mentioned, it was agreed that the case should be taken under the Aggravated Assaults Act." Now I cannot shut my eyes, when such a statement is put to me, to the conclusion that all parties are agreed to deal with this as an aggravated assault. The charge being one of an attempt to commit a rape, they then determined to deal with it as an aggravated assault, withdrew it from the proper jurisdiction, and turned it into a common assault of an aggravated nature. Coming as I do to that conclusion, I think clearly the magistrates had no jurisdiction, and cannot give themselves jurisdiction by voluntarily shutting their eyes to one part of the charge and adapting it to a charge of some other offence; they cannot give themselves jurisdiction by the prisoner being charged with a less offence. Consent does not give jurisdiction; therefore, I say it is impossible to come to the conclusion that the magistrates have *bonâ fide* found upon the evidence that it was a common assault and nothing else. The charge being of the nature I have stated, from the passage I have read, it appears that they purposely ignored the rest of the charge, for the purpose of bringing it into their jurisdiction. That seems to me a matter they had no right to do. The man ought to have been tried by a jury for the real offence with which he was charged. I may say, in conclusion, it seems to me, if this practice were to be allowed, there is not an offence against the person, of any description however serious, even up to the crime of murder, that might not be dealt with in the same way before magistrates by withdrawing from the proper tribunal the consideration of the real crime, in order to deal with the supposed crime. That would be a grave evil, and makes it the more necessary that in cases of this sort I should express the reasons by which I have been led to concur with the Lord Chief Baron, the case being heard at great length, that the rule should be made absolute.

The Court being equally divided, the

Rule was discharged.

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COURT OF QUEEN'S BENCH.

Saturday, November 9, 1861.

(Before COCKBURN, C.J. and BLACKBURN, J.)

REG. v. R. J. ELRINGTON and H. H. ELRINGTON. (a)

*Indictment—Aggravated assault—Previous dismissal of complaint by justices and certificate granted—Demurrer.**A certificate of justices of the dismissal of an information for a common assault may be pleaded in bar to an indictment founded upon the same assault, though the assault in such indictment is alleged as having caused grievous bodily harm.**An information was laid against the defendants before justices for common assault. Upon the hearing it was dismissed, and the justices granted their certificate of such dismissal pursuant to sect. 27 of 9 Geo. 4, c. 31. The prosecutor then preferred an indictment against the defendants upon the same facts, and inserted therein three counts: the first for an assault, doing grievous bodily harm; second, for assault, causing actual bodily harm; and, third, for a common assault. To this indictment the defendants pleaded the former information, the assault, its dismissal and the certificate of justices; to which plea the prosecutor demurred:**Held, that the certificate granted by the justices was a bar to the indictment.***T**HIS was a demurrer to certain pleas to an indictment.

It appeared that on the 6th September, 1860, an information was laid before certain justices acting for the division of Brentford Middlesex, by Edward Hamilton Finney, against the two defendants, for a common assault. Upon the hearing of such information upon the 22nd of the same month, the justices dismissed it as not proved, and thereupon they gave the defendants a certificate thereupon pursuant to sect. 27 of 9 Geo. 4, c. 31.

Subsequently, on the 23rd of the same month, the prosecutor preferred an indictment at the Middlesex sessions against the two defendants, in respect of the same transaction.

The indictment contained three counts: first, for assaulting s

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

doing grievous bodily harm; secondly, for assaulting and doing actual bodily harm; thirdly, for a common assault.

This indictment the prosecutor afterwards removed into this court by *certiorari*.

The defendants severally pleaded to each count the former hearing and dismissal of the information for the assault, and the granting of the certificate, and that the assaults mentioned in the indictment are one and the same as that adjudicated upon by the said justices, and in respect of which the said certificate was granted.

The prosecutor demurred to the pleas to the first and second counts of the indictment. The ground of demurrer was, that the offence stated in the two first counts of the indictment was not the same offence as that stated in the pleas and the certificates.

The following is the form of the plea pleaded to each count, *mutatis mutandis*:

MICHAELMAS TERM, in the 24th year of the reign of Her Majesty Queen VICTORIA.

AND now, that is to say, on the 2nd day of November in this term, before our said Lady the Queen at Westminster, cometh the said Richard John Elrington, by Thomas Henry Strangways his attorney, and having heard the said indictment read, he saith, that as to the first count of the said indictment our said Lady the Queen ought not further to prosecute the said indictment against the said R. J. Elrington, in respect of the offence in the said first count of the indictment mentioned, because he saith that heretofore, to wit on the 22nd of September, 1860, at the town hall, Brentford, in the said county of Middlesex, the said R. J. Elrington was, upon a certain information and complaint of the said Edward Hamilton Finney in the indictment mentioned, he being the party aggrieved in that behalf, brought before Benjamin George Armstrong and George Cooper, Esquires, two of Her Majesty's justices of the peace in and for the said county of Middlesex, charged by the said information and complaint with having within three calendar months then last past at Heston, in the said county, unlawfully and violently assaulted the said E. H. Finney on the 5th of September in the year aforesaid, contrary to the statute in that case made and provided, and the said justices then and there had jurisdiction to hear and determine the said complaint, and did then and there, to wit at Brentford aforesaid, on 22nd September aforesaid, duly proceed to hear such complaint, and upon hearing they then and there deemed the offence so complained of by the said E. H. Finney not to be proved, and thereupon they dismissed the said complaint, and forthwith made out a certificate under their hands and delivered it to the said R. J. Elrington, which said certificate is now shown to the Court here, and is in the words following, that is to say,

Middlesex, } BE it remembered that on the 6th September,
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Cooper, Esquire, one of Her Majesty's justices of the peace

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in and for the said county of Middlesex, for that Richard John Eldrington did on the 5th of September, instant, at the parish of Heston, in the county of Middlesex, unlawfully and violently assault Edward Hamilton Finney the elder, contrary to the statute, &c.

And now, at this day, to wit, on the 22nd September, in the year aforesaid, at the Town Hall, New Brentford, in the said county, both the said parties appeared before us in order that we should hear and determine the said information, whereupon the matter of the said information being by us duly considered, it manifestly appears to us that the said information is not proved, and we do therefore dismiss the same.

Given under our hands and seals this 22nd day of September, 1860, at the Town Hall, New Brentford, in the county aforesaid.

BENJ. JNO. ARMSTRONG.

GEORGE COOPER.

Which said judgment and dismissal still remain full force and effect, and not in the least reversed or made void. And the said R. J. Eldrington further saith that the violently assaulting the said E. H. Finney so complained against the said R. J. Eldrington, and which complaint the said justices so deemed not to be proved, and which they so dismissed as aforesaid, and the assaulting, beating, wounding, and ill-treating, and the cutting and wounding of the said E. H. Finney, in the said first count of the said indictment mentioned, are one and the same assault and not other and different, and are in respect of one and the same cause, and not other and different; and this he the said R. J. Eldrington is ready to verify. Wherefore he prays judgment, if our said Lady the Queen ought further to prosecute the said indictment against him the said R. J. Eldrington in respect of the said offence in the said first count of the said indictment mentioned, and that he said R. J. Eldrington may be dismissed and discharged from the same.

By sect. 28 of the 9 Geo. 4, c. 31, it is enacted that "if any person against whom any such complaint shall have been preferred for any common assault or battery shall have obtained such certificate as aforesaid, . . . in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

Ribton (*Collins* with him) now appeared in support of the demurrer, and contended that a certificate granted upon a dismissal of an information for a common assault is not bar under the statute to an indictment for an assault inflicting grievous bodily harm: (*Re Thompson*.)^(a) [BLACKBURN, J.—The case of *Reg. v. Walker*, 2 Moo. & Rob. 446, is a strong authority against you. There it was held that a plea of *autrefois convict* of an assault before justices, under the 9 Geo. 4, c. 31, is a bar to an indictment for feloniously stabbing in the same transaction.] That was merely the decision of a single Judge upon circuit. [BLACKBURN, J.—It was the decision of an eminent Judge, Coltman, J.,

(a) See the preceding case.

and the facts in that case were stronger than those in the present case. COCKBURN, C. J.—The inconvenience of such a prosecution is palpable: a man is punished for a common assault by the magistrates, and yet you say you may afterwards indict upon the same facts for an aggravated assault, so that he would not only be twice tried but twice punished.] But the Judge in such a case would take notice of his first punishment and deal with him accordingly. The summary powers of the justices are confined by the statute to common assaults. [COCKBURN, C. J.—May it not have been the intention of the Legislature to give the justices a discretion to deal with such a case as they might think proper? Suppose the party had been tried upon an indictment for a common assault and acquitted or convicted, and should be afterwards indicted for an aggravated assault: could he be convicted, the facts being the same?] It is not certain that it would be a bar. But an indictment differs from an information, for in an indictment the prosecutor shapes his charge as he likes, but upon an information it is the justices who, in fact, shape the charge, for they deal with it as they like. [COCKBURN, C. J.—The case of *Reg. v. Stanton* (5 Cox Crim. Cas. 324), is a very strong authority against you. There it was held that a conviction for an assault under the statute, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony in respect of the same assault charging an assault and wounding with intent to murder. There the learned Judge felt so strongly upon the point, that although the prior summary conviction was not pleaded, yet, as it came to his knowledge in the course of the trial, he acted upon it and imposed no actual punishment.] That case does not appear to have been argued. Many instances may be suggested in which great injustice would be done by preventing a prosecutor from preferring an indictment for an aggravated assault. The justices may choose to treat such an assault as a merely common assault, impose a nominal fine, or dismiss the charge, and so a great offender might escape.

Robinson and Poland, contra, were not called upon.

COCKBURN, C. J.—I am of opinion that there must be judgment for the defendants. We cannot speculate upon hypothetical cases when we are dealing with a demurrer. Upon the facts as stated it appears that there was an information before justices for a common assault. Upon the hearing of that information it was dismissed by them, and they granted their certificate under the statute. The prosecutor then prefers an indictment in respect of the very same transaction, and the defendants then plead the former information and certificate as a bar. Now the Act of Parliament expressly enacts that when the justices dismiss an information for a common assault they may grant a certificate, which is to be a bar to all further or other proceedings, civil or criminal, for the same cause. Then how was it in this case? Here the magistrates did hear the information, and they dismissed it and gave a certificate. There is then an indictment preferred, and not

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only is there a count for a common assault, but in respect of the very same transaction two other counts are added, merely varying the character of the assault. Now upon this very question we have two decided cases, *Reg. v. Walker* and *Reg. v. Stanton*, in both of which the learned Judges held that the former proceeding upon the information before the justices was a bar to an indictment founded upon the same assault. I think those decisions were correct. There may possibly be some inconvenience occasionally arising out of this state of the law, as referred to by Mr. Ribton; but it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred. The words of the statute are express, and this case clearly comes within them.

BLACKBURN, J.—I am of the same opinion. The statute gives the justices a power to decide upon a charge of a common assault, and it authorises them to give a certificate, which is to be a bar to all further proceedings, civil or criminal, for the same cause. Mr. Ribton suggests a possible case—that when a party complains of one thing, the justices may adjudicate upon another; but here the party went before the justices and made a complaint of a common assault. In such a case the statute gives the magistrates three alternatives—they may convict the party, or they may dismiss the complaint, or they may commit for trial. Now it seems to me, that the assault and battery, though stated in the two first counts with aggravation, are the same assault and battery upon which the justices adjudicated. *Reg. v. Walker* is certainly precisely in point. It would be extremely inconvenient if, when the justices have adjudicated, their decision could in fact be reviewed by the sessions upon another charge upon the same facts.

Judgment for the defendants.

COURT OF CRIMINAL APPEAL.

November 27, 1861.(Before POLLOCK, C.B., WIGHTMAN, J., WILLIAMS, J.,
MARTIN, B. and CHANNELL, B.)

REG. v. JOSHUA YEADON AND JAMES BIRCH.(a)

*Indictment—Counts for grievous bodily harm, cutting, stabbing, and wounding, and occasioning actual bodily harm—Verdict of common assault—Refusal to take such verdict—Miscarriage.**Upon an indictment charging the defendants in the first count with inflicting grievous bodily harm; in the second count with unlawfully and maliciously cutting, stabbing and wounding; and in the third count with assaulting and occasioning actual bodily harm; the jury returned a verdict of guilty of a common assault. The chairman declined to take that verdict, on the ground that a common assault was not included in the indictment, and told the jury to reconsider their verdict. The jury then found the defendants guilty, and a verdict was entered of guilty of an assault occasioning bodily harm, whereupon the chairman sentenced the prisoners:**Held, that the first verdict ought to have been taken, and that the second ought not, and that the prisoners ought not to undergo the sentence; that there had been a mistrial, and that a venire de novo should issue.*

CASE reserved for the opinion of this Court by the Chairman of the West Riding of Yorkshire Sessions.

Joshua Yeadon and James Birch were indicted at the quarter sessions for the West Riding of Yorkshire, held at Bradford on the 2nd July, 1861, under 14 & 15 Vict. c. 100, s. 29, and 14 & 15 Vict. c. 19, s. 4, as follows:—

“ West Riding of Yorkshire to wit.—The jurors of our Lady the Queen upon their oath present, that Joseph Yeadon, late of Otley, in the West Riding in the county of York, labourer, and James Birch, late of the same place, labourer, on the 23rd May in the 24th year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, with force and arms, at the parish of Guiseley in the said West Riding of the county of York, unlawfully and maliciously did assault one Hiram Roberts, and did then and there unlawfully and maliciously kick and wound

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law

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him the said Hiram Roberts in and upon the face, mouth and neck of him the said H. Roberts, and thereby then and there unlawfully and maliciously inflict on the said H. Roberts grievous bodily harm, to the great damage of the said H. Roberts, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

“Second count.—And the jurors aforesaid, on their oath aforesaid, do further present, that the said J. Yeadon and J. Birch afterwards, to wit on the said 23rd May, in the year aforesaid, with force and arms, at the parish of Guiseley aforesaid, in the said West Riding of the county of York, unlawfully and maliciously did cut, stab and wound the said H. Roberts, to the great damage of the said H. Roberts, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

“Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Yeadon and J. Birch afterwards, to wit on the said 23rd May in the year aforesaid, with force and arms at the parish of Guiseley aforesaid, in the said West Riding of the county of York, in and upon the said H. Roberts, in the peace of God and our said Lady the Queen, the said H. Roberts, being, unlawfully did make an assault, and him, the said H. Roberts, then and there unlawfully did beat, wound and ill-treat, and did thereby then and there occasion actual bodily harm to the said H. Roberts, so that his life was greatly despaired of, and other wrongs to the said H. Roberts then and there did, to the great damage of him, the said H. Roberts, and against the peace of our said Lady the Queen, her crown and dignity, and against the form of the statute in such case made and provided.”

The indictment did not contain any count for a common assault merely.

On behalf of the prosecution it was proved that Yeadon and Birch, on the 23rd May, about a quarter past eleven at night, burst open the housedoor of one Sarah Clayton, where H. Roberts was sitting with her and her son, a lad aged sixteen. On entering they both attacked Roberts; he was twice knocked down and was kicked about the face and body, had his chin cut open and lip cut through, two teeth knocked out, and was saved from further injury by the entrance of neighbours. A surgeon attended him all the next day and the following morning.

On behalf of the defence it was alleged by way of justification that Yeadon and Birch did not burst open the door, but that Roberts opened it from the inside and struck the first blow with a fire poker.

The amount of injury sustained by Roberts, and the fact that it was done by the defendants, was never denied.

The Jury were told by the chairman in his summing up, that the defendants were charged with an aggravated assault under a statute specially framed to meet such cases as are not sufficiently punishable under the Common Assaults Act.

They retired and found a verdict of "guilty of a common assault."

Before the verdict was entered, the chairman told the jury that they had found the defendants guilty of an offence with which they were not charged in the indictment, and that they must reconsider their verdict: that if they thought the defendants had unlawfully assaulted Roberts, and thereby occasioned him actual bodily harm, they must find the defendants guilty, but must acquit them if there was any doubt.

They then found the defendants guilty, and a verdict was entered of "guilty of an assault occasioning bodily harm."

On this it was contended for the defence, that the first verdict, "guilty of a common assault," was really an acquittal, and ought to have been taken as such.

The chairman doubted, but sentenced the defendants, each of them, to hard labour for four calendar months, and discharged them on their finding bail, to appear and render themselves in execution of judgment.

The opinion of the Court is asked whether the verdict of guilty of a common assault ought to have been taken, and was tantamount to an acquittal, or should the second verdict stand, and the defendants undergo the sentence.

FRANK WORMALD, Chairman.

No counsel appeared for the prisoners.

T. Campbell Foster for the prosecution.—No doubt the first verdict of guilty of a common assault was one which ought to have been taken, and it has been so held upon this form of indictment: (*Reg. v. Oliver*, Bell's C. C. 287, and 8 Cox Crim. Cas. 384.) The substance of the offence charged and proved was a battery, which includes an assault. It is submitted that the latter part of the second verdict, "occasioning bodily harm," is merely matter of aggravation, and may be struck out, and that that verdict may be treated as one of assault only, and therefore in substance the same as the first verdict.

By the COURT.—We are of opinion that the first verdict of "guilty of a common assault," ought to have been taken, as it might have been, upon this indictment, and that the second verdict ought not, and that the defendants ought not to undergo the sentence.

Cur. adv. vult.

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By the COURT.—In this case there has been a mistrial, and a *venire de novo* must be awarded.

Venire de novo.

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COURT OF CRIMINAL APPEAL.

January 18, 1862.

(Before ERLE, C.J., BLACKBURN and KEATING, JJ., WILKINS and MELLOR, J.)

REG. v. STANBURY. (a)

*False pretences—Venue.**The venue in an indictment for obtaining sheep by false pretences laid in county E., where the prisoner was convicted. It appears that the sheep had been obtained by the prisoner in county M. and that he conveyed them into the county of E. where he was apprehended:**Held, that he had been indicted in a wrong county.*

CASE reserved for the opinion of this Court by T. C. G. M. Chairman of the Essex Quarter Sessions.

The prisoner was indicted at an adjourned quarter session for the county of Essex for obtaining sheep by false pretences. The venue was laid in Essex. The sheep were, in the first instance, obtained in Middlesex, and remained continuously in his possession till a few days subsequently. He conveyed them into Essex where he was apprehended.

The prisoner was convicted and sentenced to twelve months imprisonment with hard labour, and is now in prison.

The question reserved was, whether under the venue, the indictment could be sustained: (*Reg. v. Simmons*, 1 Moo. C. C. 40 24 & 25 Vict. c. 96, s. 114.) (c)

No counsel appeared on either side.

ERLE, C. J.—I regret to say that we are obliged to come to the conclusion that the prisoner was indicted in a wrong county. He is liable to be indicted and prosecuted in the county in which he obtained the property by false pretences.

Conviction quas

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) In *Reg. v. Simmons*, the facts were, that a constable took the prisoner with stolen horses in Surrey, and afterwards, at his request, rode with him on the horses to Kent, where the prisoner escaped. The prisoner was subsequently apprehended in Kent, and indicted there for stealing the horses, and convicted. On appeal reserved, the judges were unanimously of opinion that there was no evidence of stealing and that the conviction could not stand, but that the prisoner should be removed to Surrey.

(c) The 24 & 25 Vict. c. 96, s. 114, enacts that stealers of property in one part of the United Kingdom, who have the same in any other part of the United Kingdom, may be indicted and punished in that part of the United Kingdom where they have the property.

COURT OF CRIMINAL APPEAL.

January 25, 1862.

(Before ERLE, C.J., WIGHTMAN, J., WILLIAMS, J., WILDE, B.
and MELLOR J.)

REG. v. WOODWARD. (a)

Feloniously receiving—Husband and wife—Guilty knowledge.

The principal felon, during the prisoner's absence, left the stolen property with the prisoner's wife, who gave him sixpence on account. Afterwards the principal felon and the prisoner met and agreed on the price, and the prisoner paid the balance. Guilty knowledge as to the property having been stolen was inferred from the other circumstances of the case :

Held, that the receipt was not complete till the principal felon and the prisoner had agreed as to the price, and that the prisoner knowing then that the property was stolen, was properly convicted of feloniously receiving.

CASE reserved for the opinion of the Court of Criminal Appeal. At the quarter sessions of the peace for the county of Wilts, held at Marlborough, on the 16th day of October, 1861, before me, Sir John Wither Awdry, Bart., and others my fellows, Benjamin Woodward, of Trowbridge, in the county of Wilts, dealer, was found guilty of receiving stolen goods, knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labour, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the principal felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6d. on account, but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

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The Court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the Court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the Court shall be of a contrary opinion, then the conviction is to be quashed.

J. W. AWDRY.

G. Broderick, for the prisoner.—This conviction, it is contended, cannot be sustained. At the trial it was not said on the part of the prosecution that the wife of the prisoner was her husband's agent in receiving the property, but that he subsequently adopted her act of receiving by paying the balance of the price agreed upon. But there was no evidence of any guilty receipt by the wife, or of any subsequent act of receiving by the prisoner. The guilty knowledge and act of receiving must be simultaneous. [*Reg. v. Dring and Wife* (1 Dears. & Bell, 329; 7 Cox Crim. Cas. 382), where a husband and wife were jointly indicted for receiving stolen goods, and the jury found both guilty, stating that the wife received them without the control or knowledge of and apart from her husband, and that he afterwards adopted her receipt, it was held that the conviction could not be sustained as against the husband; and in his judgment, Cockburn, C.J., observed that "If we are to take it that the jury meant to say, 'We find the prisoner guilty if the court should be of opinion that upon the facts we are right,' then we ought to be able to see that the prisoner took some active part in the matter, that the wife first received the goods and then the husband from her, both with a guilty knowledge." [BLACKBURN, J.—The verdict in this case is, that he did receive them: there is no question raised as to whether the verdict was justified. ERLE, C.J.—Receiving is a very complete term. There is the case where two persons stole fowls, and took them for sale in a sack to another person, who knew them to have been stolen. The sack was put in a stable and the door shut, while the three stood aside haggling about what was to be paid for them. There the judges differed as to whether there was a receiving by the third person in whose stable the sack was put.] That was the case of *Reg. v. Wiley* (4 Cox Crim. Cas. 412). The actual receipt of the goods was by the wife, and it is consistent with the evidence that the goods may never have come into the prisoner's possession at all: (The case of *Reg. v. Button*, 11 Q. B., 3 Cox Crim. Cas. 229, were also cited.)

ERLE, C. J.—The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods and left them, and that sixpence was paid on account of them by the prisoner's wife, but there was nothing of the nature of a complete receipt of the goods until the thief found

the husband and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the husband agreed; till then the thief could have got the goods back again on payment of the sixpence. I am of opinion, therefore, that the conviction should be affirmed.

BLACKBURN, J.—The principal felon left the stolen property with the wife as the husband's servant, but the Court below, as I understand the case, doubted whether the husband could be found guilty of feloniously receiving, as he was absent at the time when the goods were delivered to the wife, and could not then know that they were stolen. It is found that, as soon as the husband heard of it, he adopted and ratified what had been done, and that as soon as he adopted it he had a guilty knowledge; he therefore at that time received the goods knowing them to have been stolen.

KEATING, J.—I am of the same opinion. The case finds that the agreement as to the price was not complete till the thief and the husband agreed. I think therefore that the receipt was not complete till then, and that the conviction was right. If we were to hold that the conviction was not right, the consequences would be very serious.

WILDE, B.—I read the case as showing that the wife received the goods on the part of the prisoner her husband, and that act of her was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of *Reg. v. Dring and Wife*, the only statement was "that the husband adopted his wife's receipt," and the court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

MELLOR, J. concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

January 18, 1862.(Before ERLE, C.J., BLACKBURN, and KEATING, JJ.,
WILDE, B., and MELLOR, J.)

REG. v. BAIN. (a)

*Indictment for felony—Breaking and entering a shop with intent—
Attempt to commit a felony.**On an indictment under the 24 & 25 Vict. c. 96, s. 57, for feloniously
breaking and entering a shop with intent to commit a felony :**Held, that a prisoner might be found guilty of misdemeanor in attemptin
to commit that felony.*CASE reserved for the opinion of the Court of Criminal Appeal
by the Recorder of Manchester.

At a Court of Quarter Sessions of the Peace holden in and
for the city of Manchester, in the county of Lancaster, on the
13th Dec. 1861, John Bain was tried before me on an indictment
for having on the 5th Dec. feloniously broken and entered a certain
shop with intent to commit felony, to wit, feloniously to steal
certain moneys, goods and chattels therein.

At the trial, it appeared the prisoner was disturbed before
he had completed the offence with which he was charged. He
was seen on the roof of the shop he was indicted for breaking
and entering, and taken coming off the roof. On examining the
roof it was found that a large hole, upwards of two feet square
had been broken in it, but there was no evidence at all of his
having in any way entered the building.

Upon this I told the jury that the prisoner was entitled to his
acquittal on the charge of felony, but that if they were of opinion
that he broke the roof with intent to enter the shop and steal the
goods, they might find him guilty of a misdemeanor in attempting
to commit that felony.

The jury found him guilty of the misdemeanor of attempting
to commit a felony.

The question for the opinion of the Court of Criminal Appeal is whether the prisoner could be convicted of a misdemeanor on this indictment, which is for a felony created by the 24 & 25 Vict. c. 96, s. 57.(a)

The prisoner was on bail before the trial, and is now on bail to appear and receive sentence when called on.

R. B. ARMSTRONG, Recorder of Manchester.

The 24 & 25 Vict. c. 96, s. 57, enacts that whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of Divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable to penal servitude not exceeding seven years, and not less than three years, or to imprisonment not exceeding two years, &c.

No counsel appeared to argue on either side.

By the COURT :

Conviction affirmed.

(a) The 14 & 15 Vict. c. 100, s. 9, which enacts that a party indicted for felony or misdemeanor may be found guilty of an attempt to commit the same, and shall be liable to the same consequences as if charged with and convicted of the attempt only, is unrepealed. We presume therefore that the question intended to be reserved was whether that enactment would apply to a felony created since.

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Attempt to
commit.*

COURT OF CRIMINAL APPEAL.

January 18, 1862.(Before ERLE, C.J., BLACKBURN and KEATING, JJ.,
WILDE, B., and MELLOR J.)

REG. v. EDWIN CHEESEMAN.(a)

Larceny—Attempt to commit—Proximate act—Ownership.

It was the course of business for a contractor who supplied the camp to send the meat to the quartermaster-serjeant at the camp. The quartermaster-serjeant had his own weights and scales; he and a servant of the contractor weighed out the quantities for the messes, and a soldier attended from each mess, and took it away as weighed. The amount delivered was credited to the contractor, and the surplus meat taken away by the contractor's servant. The prisoner, the contractor's servant, in charge of the meat, fraudulently put a false weight into the scale, and a complaint having been made that a mess was short weight, absconded when it was discovered. It was found that the quartermaster's weight had been removed, and the false weight substituted; that the weight of meat delivered was certain pounds short.

The jury found that the prisoner fraudulently substituted the weight with intent to cheat, intending to carry away and steal the difference between the just surplus for which he would have to account to his master, and the apparent surplus remaining after the false weighing, and that he would have carried it away if the fraud had not been detected:

Held, that the prisoner was properly convicted of an attempt to steal the meat, and also that the property in such meat was properly laid in the prisoner's master.

CASE reserved for the opinion of this Court by Blackburn, J. Edwin Cheeseman was tried before me at the Maidstone Summer Assizes 1861.

The indictment contained three counts:—

The first charged the prisoner with fraudulently keeping a false weight and selling thereby to the Queen 467lbs. of meat as 512½lbs.

The second count stated that Alfred Cheeseman was accustomed to furnish the Queen with large quantities of meat for the supply of soldiers, and that the prisoner being his servant, fraudulently kept a false weight, &c., as in the first count.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The third count was for an attempt to steal 45lbs. of meat of Alfred Cheeseman.

On the trial it was proved that Alfred Cheeseman was the contractor who supplied meat to the camp at Shorncliff.

The course of business was that the contractor each morning sent down by his servants a quantity of meat to the quarter-master-serjeant at the camp, and a soldier from each mess attended. The quarter-master-serjeant has his own weights and scales, which are kept at the camp. With these he and the contractor's servant together weigh out to each of the soldiers in attendance, respectively, the proper quantity of meat for each of their respective messes, and each mess is taken away by the soldier as weighed out and delivered to him. The amount of the whole thus delivered is credited to the contractor as supplied to the Queen, and the surplus of the meat brought down remaining after all the messes have been supplied is taken away by his servants on his account.

On the 27th June, the prisoner, who was a servant of the contractor, came down in charge of the meat, and he and the quarter-master-serjeant proceeded to weigh out the meat to the different messmen with the quarter-master-serjeant's weights, the prisoner being the person who put the weights in the scale. Before the weighing was complete one of the messmen brought back his mess portion, with a complaint that it was short weight. He was desired to wait till the weighing was over, when his complaint should be investigated. The weighing proceeded, and in all thirty-four messes were weighed out, which were supposed to be in the whole 512½lbs; about 60lb. weight of meat remaining over, which, in the course of business, would have been removed by the contractor's men. The complaint as to short weight was then investigated. It was discovered that the 14lb. weight belonging to the quarter-master-serjeant had been removed and concealed under a bench, and that a false 14lb. weight had been substituted for it, and used in weighing out the thirty-four messes, and that the prisoner had absconded on the commencement of the investigation. The messes were all brought back and reweighed, and it was found that the weight delivered was 467½lb. instead of being 512½lb., as on the first weighing it had appeared to be; and after the true weight was supplied to the different messes the surplus remaining to be taken by the contractor's men was about 15lb. instead of being about 60lb. as it had appeared to be.

The counsel for the prisoner objected that there was no case to go to the jury, inasmuch as the circumstances stated did not amount to a cheat at common law, and there was no overt acts so proximately connected with an attempt to steal as to justify a conviction under the third count.

The jury, in answer to questions from me, found that the prisoner fraudulently substituted the false 14lb. weight for the true weight, with intent to cheat; that his intention was to carry away and steal the difference between the just surplus of about 15lbs., for which he would have to account to his master, and the apparent

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surplus meat actually remaining after the false weighing, and that nothing remained to be done on his part to complete his scheme, except to carry away and dispose of the meat, which he would have done, had the fraud not been detected.

I directed a verdict of not guilty on the first count, and guilty on the second and third counts, and reserved for this Court the question whether, on these facts and findings, the prisoner was properly convicted on either of those counts.

The prisoner was admitted to bail.

COLIN BLACKBURN.

Ribton, for the prisoner.—As regards the second count, there is no offence disclosed which is indictable at common law. That count is substantially the same as the first, the only difference being that the prisoner is charged as a servant in the second count. There was no evidence to show that the prisoner kept a false weight in the sense required to sustain this count. Merely keeping a false weight is no offence at common law. The prisoner may have had it in his pocket. The offence is, when a man keeps a false weight in his shop for the purpose of being used in the course of his trade and defrauding the public. The count also alleges that the prisoner sold, but it was his master who sold the meat to the Queen; he was the contractor. As to the third count, the finding of the jury is not sufficient to support the conviction upon it. The jury say it was the prisoner's intention to carry away and steal the difference between the false weight and the true weight. That does not warrant the jury in finding the prisoner guilty of an attempt to steal. There must be some overt act connected with the thing itself. Here nothing was done by the prisoner in the way of an attempt; the only thing he did was to put the false weight into the scale. That is too remote to make it evidence of an attempt to commit a larceny of the meat. There is a difference between an attempt and the doing an act with intent to obtain an object. A man may get a rifle made in America wherewith to shoot some one in England, or a burglar may procure a picklock to be made, but without some extrinsic evidence, the procuring a rifle or the picklock is no evidence of an attempt to murder or to break into a house. But for the act of the prisoner's absconding, there could be no pretence for saying that the prisoner had been guilty of an attempt to steal the meat. In *Reg. v. St. George* 9 Car. & P. 483(a), it was held that if a person, intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded firearms "by drawing a trigger or in any other manner" within the 1 Vict. c. 85, s. 34. So in *Reg. v. Lewis* (9 Car. & P. 523), where the prisoner, on a refusal by the prosecutor to give him some title-deeds, addressed him, "Then you are a dead man," and immediately unfolded a great-coat and took out a loaded blunderbuss, but was not able to point it at the prosecutor before he was seized, it was held not sufficient to sustain a charge of attempting to discharge the blunderbuss at the prosecutor. Further,

the third count describes the meat as the property of the prisoner's master. It is submitted that the meat when put into the scale was the property of the Queen, and that portion which the jury find the prisoner intended to steal ought to have gone to the soldiers. The conviction, therefore, is bad on this ground also.

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ERLE, C. J.—I am of opinion that the prisoner was properly convicted. It is not necessary to determine whether this was a cheat at common law. The evidence is sufficient to support the verdict on the third count, which charged an attempt to steal 45lbs. of meat of Alfred Cheeseman. It is said on behalf of the prisoner that there was no overt act proximately connected with an attempt to steal, and that the meat was not the property of the prisoner's master, as laid in the indictment. I think that the prisoner's counsel has failed on both grounds. It appears that the prisoner, having the charge of the meat, took it down to the camp, and went through the form of delivering a part without delivering the whole quantity. If he had kept back a part and had begun to carry it away, he would have been guilty of the crime of larceny. Where there are several acts proximately connected with larceny, and close to the point of completion, as the preparing the false weight and substituting it for the true weight, and handing over a false weight of meat for the true weight, and keeping back the difference between the false weight and the true weight under his (the prisoner's) own control and possession, it seems very like the case of a servant sent to deliver two articles, fraudulently keeping one in his pocket, and handing over one only. Everything was complete in this case but the beginning to move off with the meat so kept back. The prisoner had the very control of the thing he intended to steal. There was evidence therefore of a sufficiently proximate overt act to constitute an attempt to commit a larceny. Then the next point is, was the meat the property of the prisoner's master? The transaction was one of sale, and all the property in the meat remained in the vendor till by delivery it had passed to the vendee. The conviction therefore was right on the third count.

BLACKBURN, J.—I am of the same opinion. There is a great difference between preparations antecedent to the commission of an offence and an attempt to commit the offence, as in the case of merely going to buy a gun wherewith to commit a murder, which I do not think would be evidence of an attempt to commit a murder. But in the present instance the actual crime has commenced and the attempt would have ended in the completion of the crime, had not the prisoner been interrupted. Though nothing had been done which formed part of the crime, the attempt to commit it had commenced. There is nothing in the second point, because until the meat was weighed out and delivered over to the quartermaster the property remained in the prosecutor.

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WILDE, B.—I am of the same opinion. The crime which the prisoner intended to commit consisted of two parts. First, there was the reception of the thing intended to be stolen, the getting it into the prisoner's custody; and secondly, the carrying it away. The prisoner had completed the first part, but was detected before he could complete the second. He had therefore attempted to commit the offence.

MELLOR, J.—I am of the same opinion and for the same reasons.

Conviction affirmed (a).

(a) When this case was called on, five judges were in court, but one immediately left *animo revertendi*, as was supposed, but this turned out to be an error. In the course of the argument in the next case the Court was reminded that by the 11 & 12 Vict. c. 78, s. 3, the presence of five judges was required to constitute a Court, whereupon Keating, J., came and made up the number. This case was then formally called on again, and *Ribton* quoted *Reg. v. St. George*, 9 C. & P. 483; and *Reg. v. Lewis*, *Ib.* 523, in addition to his former argument. The Court said that those cases made no difference in the judgment, and that there is a difference between those cases and the acts proved here with reference to the crime of larceny.

COURT OF CRIMINAL APPEAL.

January 18, 1862.

Before COCKBURN, C.J., ERLE, C.J., POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., CROMPTON, and WILLES, JJ., BRAMWELL, and CHANNELL, BB., KEATING, J., WILDE, B., and MELLOR, J.)!

REG. v. GIBBONS. (a)

Perjury—Materiality of the matter sworn—Evidence affecting credit of principal witness.

On the hearing of the summons taken out by A. for an order of affiliation on H. of a bastard child born in March, A. was asked in cross-examination whether she had not had carnal connection with C. in the previous September. She denied it. The justices wrongly allowed C. to be called to contradict her, and he swore that he had connection with her in the September previous. C. was afterwards indicted and convicted for perjury in having sworn that in the September previous he had had connection with A :

Held by eleven judges (Martin, B. and Crompton, J. dubitantibus), that although C.'s evidence was inadmissible in point of law, yet having been admitted and being relevant to the credit of a material witness in the cause, perjury could be assigned upon it.

CASE reserved for the opinion of this Court by Williams, J. In this case the defendant was tried before me at the last assizes for the county of Sussex, for perjury, in having falsely sworn that, in Sept. 1860, he had carnal knowledge of the person of Ann Bishop.

She was delivered of a bastard child on March 29, 1861. On the 28th of June following, an application made by her for an order of affiliation on one Harmer came on to be heard before the magistrates, and she made a deposition in support of such application. She was then cross-examined on the part of Harmer as to whether she had not had connection with the defendant in the previous September. She denied it. The defendant was afterwards called as a witness on behalf of Harmer, and swore that he had had connection with her as imputed by the question put to her.

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On the trial before me, at the close of the case for the prosecution, it was objected by Mr. Addison, the counsel for defendant, that the evidence given by the defendant, on which the perjury was assigned, was not material to the issue raised on the application for the affiliation order, inasmuch as the question put to Ann Bishop, as to having had connection with the defendant went merely to her credit, and therefore her answer ought to have been regarded as conclusive, and the evidence of the defendant in contradiction of her was inadmissible and illegal, and not material to the question raised before the magistrates.

The defendant was convicted, but I reserved the point for the consideration of this Court whether the objection made on his behalf was well founded.

EDWARD VAUGHAN WILLIAMS.

The case was twice argued; first time Nov. 16, 1861, before Pollock, C.B., Wightman and Williams, JJ., Channell, B., and Keating, J., but they not being able to agree in opinion, directed a rehearing before the full Court. The substance of both arguments will be found below.

Addison, for the prisoner.—It is submitted that the conviction is bad. It is to be assumed that the defendant could not be the father of the child, and therefore it is contended that his evidence in contradiction of the woman, as to having had intercourse with her in the previous September, was not material to the issue, and perjury could not be assigned upon it. Any question which would have thrown a doubt on the paternity, which was the question to be decided by the justices, would have been material; but any question as to intercourse with the woman in September had nothing to do with the paternity of the child, which was born in March. The principle seems to be that the evidence on which perjury can be assigned must relate to the direct matter in controversy, or must relate to a collateral matter which tends to corroborate the witness's evidence upon the principal matter. In the present case the alleged perjury was not calculated to influence the decision of the magistrates in any way. The 5 Eliz. c. 9, is the first statute relating to perjury, and Coke (3 Inst. c. 74) in commenting upon this statute says, that the perjury must be "in a matter material to the issue or cause in question: for if it be not material, then though it be false yet it is no perjury, because it concerneth not the point in issue, and therefore in effect it is extra-judicial." Reference was then made to *Rex v.* — (1 Freeman, 505; Hawk. P. C. bk. 1, c. 69, s. 8.) In *Reg. v. Mantor* (Palmer, 382), the point was, whether a man was insane at the time of death, and evidence that he was insane five days before his death was held immaterial. In *Custodes v. Howell Gwin* (Style, 374), it is said that "of a false oath not touching the matter in question, an indictment lies not." The cases of *Rex v. Griepe* (1 Ld. Raym. 258; 12 Mod. 139); *Rex v. Muscot* (10 Mod. 195); *Rex v. Dunston* (Ry. & Moo. 109); *Rex v. Nicholl* (1 B. & Ad. 21); *Reg. v. Bartholomew* (1 C. & K. 366), were then cited. In *Reg. v. Murra*

(1 Fes. & Fin. 80), Martin, B., after consulting Byles, J., held that false swearing in answer to questions tending only to the discredit of the principal witness in the case, did not amount in law to perjury. In *Reg. v. Overton* (2 Moo. C. C. 263), the question, though not material to the issue, had a tendency to corroborate the principal evidence. [POLLOCK, C.B.—The point whether a witness commits perjury ought not to depend on whether or not the question should have been shut out. In *Reg. v. Philpotts* (5 Cox Crim. Cas. 363; 2 Den. C. C. 309; 21 L. J. 20, M. C.,) Lord Campbell said: "It has been said, if the judge were wrong in admitting the document in evidence, the defendant could not be convicted, making the offence of perjury to depend upon whether a judge were right or wrong in his direction on a question of law, and upon the decision of some nice point in a bill of exceptions, which might ultimately go to the House of Lords. We are of opinion as the evidence was given in a judicial proceeding with the view to the reception in evidence of a document which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present, and that the conviction must be affirmed."] The cases of *Reg. v. Lavey* (3 Kar. & K. 26; 5 Cox Crim. Cas. 259); *Rex v. Martin* (6 Car. & P. 562); and *Rex v. Robins* (2 Moo. & Rob. 512), were then cited.

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Barrow for the prosecution.—The conviction was right. The evidence in question was material as affecting the credit of the woman before the magistrates. (Taylor on Evidence, s. 1295.) It might affect the amount they would order to be paid to her. In *Rex v. Gripe*, Holt, C.J. said: "It is not necessary to appear in an information for perjury to what degree the point in which the man is perjured was material to the issue; for if it be but circumstantially material it will be perjury. . . . So if a witness swears to the credit of another witness, if it be false it will be perjury if it conduces to the proof of the point in issue." The cases of *Thomas v. David* (7 C. & P. 350), and *Rex v. Barker*, 589, were then cited. [CHANNELL, B.—In the report of *Reg. v. Philpotts* (in 21 L. J. 20, M. C.,) there is a strong opinion of Maule, J., expressed in the course of the argument, that a man is guilty of perjury who swears falsely as to what might have been objected to.] The cases of *Reg. v. Meek* (9 C. & P. 313), and *Bury v. Watkins* (7 C. & P. 308), were then cited. As to *Reg. v. Murray* [MARTIN, B.—I do not think that case ought to be considered any authority. It was only my impression of what was material, formed hastily on circuit.] *Reg. v. Berry* (8 Cox Crim. Cas. 121), was then cited.

Addison replied.

COCKBURN, C. J.—I have to deliver the opinion of all my brothers except Crompton, J., and Martin, B. We are of opinion that the conviction was right and ought to be affirmed. It is quite clear that the question put to the principal witness in the case was a pertinent question, and one which she was bound to answer. It

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is true that the question had not reference to the main issue of paternity then before the court, but it had immediate reference to a question arising upon and subordinate to that, viz., how far she was deserving of credit. Possibly, if she had answered the question in the affirmative, it might not have affected the decision of the magistrates; but she was bound to answer, and I therefore entertain no doubt that if she had answered the question falsely she might have been indicted for perjury. I agree that, it being a question affecting her credit, and relevant only on that ground, all parties ought to have been bound by the answer she gave; but the magistrates thought proper to admit the evidence of the defendant in contradiction. That was not, in point of law, admissible, but, being admitted, it had reference to what was a material question on the inquiry. We have the authority of Hawkins, P.C., Bk. 1 Ch. 69, "that, though the evidence signify nothing to the merits of the cause and is immaterial, yet, if it has a direct tendency to corroborate the evidence concerning what is material, it is equally criminal in its own nature, and equally tends to abuse the administration of justice, and there does not seem to be any reason why it should not be equally punishable." Now the evidence having been admitted, *Reg. v. Philpotts* is a direct authority for saying that perjury might be assigned upon it, inasmuch as it was a relevant question. I must say that I go along with the principle in *Reg. v. Philpotts*, and think that, although in point of strictness the evidence was open to objection, yet it does not lie in the mouth of the defendant to say that the question was not one as to which he was not bound to speak the truth. The conviction must be affirmed.

CROMPTON, J.—I am by no means satisfied that this was a right conviction. It seems to me that the prosecution must show that this was a material question in the cause. The old doctrine can hardly be impugned that the evidence upon which perjury may be assigned must be relevant to a material question in the cause. Then was this a question material, or any question at all in the cause, whether on such a day the mother of the child had this carnal intercourse with the defendant? It is clear that she could only have been asked this question as going to her credit, and that when asked the question all parties are obliged to take the answer of the witness. I agree with the Lord Chief Justice, though doubtful once, that if the witness is cross-examined as to a matter going to his credit, that is material in the cause, and that if he gives a false answer he is indictable for perjury; but then his answer is conclusive. Now, it appears to me that it was not a material, or any question in the cause, whether the intercourse suggested by the question took place. It was to be assumed to be a fact that it did not from the answer of the woman to the question put to her. The evidence was not admissible, because the fact must be taken to have been proved by the answer of the woman. It is very different from the case where the question is a step in the cause, as in *Reg. v. Philpotts*. My doubt arises from

this, that it was to be assumed from the answer of the woman how the fact was. If then it was not a material question in the cause, the question of perjury could not arise.

MARTIN, B.—The test I would apply to the case is this: assume that all the facts were set out on the record up to the contradiction of the woman by the defendant, would that contradiction have been material to the issue? I think it would not. The question to my mind is, whether in point of law it was material to the issue. The blunder of the magistrates in admitting the evidence in contradiction cannot alter that. I cannot conceive how the error of the magistrates can make that evidence material in the sense in which it should be material to support an assignment of perjury upon it. If the evidence upon which perjury may be assigned is to depend on what the justices in petty sessions may choose to admit as evidence, the greatest mischief will arise.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

January 18, 1862.

(Before ERLE, C.J., BLACKBURN and KEATING, JJ., WILDE, B., and MELLOR, J.)

REG. v. JOHN CORSS SMITH. (a)

Statute—Repeal—Saving clause—Offence committed before expiration of repealed statute—Bankrupt.

The 12 & 13 Vict. c. 106, s. 251, enacted among other things, that a bankrupt not duly surrendering himself to the court should be deemed guilty of felony, and be liable to transportation or imprisonment.

The 24 & 25 Vict. c. 134, s. 230, repealed the above enactment, "but such repeal shall not affect any proceeding pending or any penalty incurred, or that may be incurred, in respect of any transaction, act matter, or thing, done or existing prior to or at the commencement of this act, under or by virtue of any of the acts or parts of acts repealed."

The offence of not surrendering to the Bankruptcy Court pursuant to the 12 & 13 Vict. c. 106, was complete on the 26th September, 1861. The bankrupt commissioner issued his warrant for the apprehension of the prisoner, and the information on which it was founded was given, and also the magistrate's warrant for the prisoner's apprehension was issued before the repeal of the 12 & 13 Vict. c. 106. The indictment framed on that statute was not found until after its repeal:

Held, that the warrants and information made this a proceeding pending within the saving part of the repeal clause, sect. 230 of the 24 & 25 Vict. c. 134.

CASE reserved for the opinion of this Court by the Recorder of London:—

At a session of the Central Criminal Court, held on Monday, the 16th Dec. 1861, John Corss Smith was tried before me on an indictment preferred and found against him on the 25th Nov. last, which charged that he, being adjudged a bankrupt, feloniously did not surrender himself to the Court of Bankruptcy on the day limited for his surrender—that is to say, on the 26th Sept. 1861—with intent to defraud his creditors.

The bankruptcy and non-surrender were proved. It was also

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

proved that a warrant of the commissioner for the prisoner's apprehension on this charge, and the information on which it was founded, were signed and dated before the coming into operation of the new Bankruptcy Act, and that the magistrate's warrant for the like purpose was also issued a week before that period—namely, on the 4th Oct. 1861.

Mr. *Metcalf*, on behalf of the prisoner, contended that the indictment must fail, inasmuch as the stat. 12 & 13 Vict. c. 106, s. 251, upon which it was founded, had been repealed from and after the 11th Oct. 1861, by 24 & 25 Vict. c. 134, and that sect. 230 of the latter Act was not sufficiently large in its terms to preserve the offence of felony. He contended, as to sect. 230, that the indictment was not “a proceeding pending” on the 11th Oct. 1861; that the word “penalty,” used in that section, must be construed “pecuniary penalty;” but that, even if a larger construction should be put upon it, so as to include penal servitude or judicial punishment of any kind, yet that the penalty alone was preserved, and not the offence of felony. He referred to *Reg. v. Swan* (4 Cox Crim. Cas. 108), and *Reg. v. Nairn* (4 Cox Crim. Cas. 115), in support of his argument, and contended that, though penalties might be preserved and proceedings kept alive, the offences were not mentioned, and that the offences must be preserved in the clearest and most express terms before a conviction could take place.

Mr. Serjt. *Parry*, for the prosecution, contended that the indictment was a proceeding pending within the meaning of the 230th section of the last Act, the warrant of the commissioner for the prisoner's apprehension, and the warrant of the magistrate for the like purpose, having issued at least a week before the coming into operation of the new Act, and the information on which the warrants were granted, and the direction of the commissioner to prosecute, being both before the new Act; that the offence of the prisoner was complete on the 26th Sept., and that he had then incurred the “penalty” of penal servitude; and that if the new Act preserved the penalty, it must of necessity preserve the offence of felony.

The prisoner was found guilty by the jury, but entertaining great doubts whether the prisoner was liable to be convicted of felony, I respited judgment and discharged the prisoner on recognizance, with sureties, and reserved for the consideration of the Justices of either Bench and Barons of the Exchequer, the question;—

Whether, under the circumstances, the prisoner was liable to be convicted of felony.

RUSSELL GURNEY.

Metcalf for the prisoner.—This conviction cannot be sustained. The indictment was found on the 25th Nov., and on the 11th Dec. the prisoner was convicted for his non-surrender to the Court of Bankruptcy. The statute under which he was indicted, the 12 & 13 Vict. c. 106, s. 251, was repealed, and also certain preceding

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Acts, from and after the 11th Oct. The words used, however, in the exceptional clause were not sufficiently large to preserve the charge of felony for which the prisoner was tried. The word "penalty" must be construed as a pecuniary infliction, and has no application to the crime of felony. Mr. Serjt. Parry, at the Central Criminal Court, contended that the offence came within the exception comprised in the 230th section of the Bankruptcy Act, inasmuch as the warrant for the prisoner's apprehension was issued at least a week before that Act came into operation. But if that statute preserved any penalty it must be that for felony, which clearly could not have been contemplated by the law. The prisoner was found guilty, but judgment was arrested on the point whether, under the circumstances stated, the prisoner had been convicted of an offence which had been kept alive by the statute which repealed all the old Acts, with certain exceptions specified in sect. 230. With regard to Acts repealed, they are to be taken as having no existence. The offence for which the prisoner could be tried, if any, was a mere statutable one. There was no offence committed unless the repealing statute had preserved that offence. The words of sect. 230 of 23 & 24 Vict. c. 134, are—"all other Acts, or parts of Acts, which are inconsistent with this Act, are repealed;" and then it is provided that "such repeal shall not affect any proceeding pending, or any right that has arisen, or may arise, or any penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of this Act, under or by virtue of any of the Acts, or parts of Acts, repealed." Those words do not keep alive an offence committed before the passing of the Act, for the purpose of indicting a man for it. That for which the bankrupt was indicted, namely, non-surrender to the Court of Bankruptcy, was a statutable offence. No argument could be drawn from the common law, and the statute being swept away the offence fell with it. Mr. Serjt. Parry contended below, that inasmuch as the warrant for the apprehension of the prisoner was granted before the passing of the Act, as well as the commissioner's order to prosecute, that the offence was kept alive, and made a "proceeding pending." The latter words no doubt would keep alive the warrant of the commissioner for the purpose of protecting the officer in its execution, but not for any proceeding in a criminal court. It was not a "proceeding pending" connected with the indictment; it was a warrant for an apprehension prior to the commencement of a prosecution, but it was not a "proceeding pending" within the meaning of the section. Although the warrant of commitment might have saved a prosecution under the Game and other Acts, to get over the period of limitation for the commencement of a prosecution, yet there is no case to show, in the words of the section, that a warrant for a commitment is a "proceeding pending." The real question raised in the court below was whether the words "penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done,

or existing prior to or at the commencement of this Act" saved the offence. It would be contended that the word "penalty" was to be used in a larger sense. No doubt the word "*pœna*," from which "penalty" was derived, showed that, as generally used, it had that signification; but its legal meaning is limited to the extracting from a man a pecuniary fine for something he has done, and not imprisoning, transporting, or hanging him for any offence.

WILDE, B.—What is "the extreme penalty of the law?"

Metcalfe.—No doubt that is death.

BLACKBURN, J.—In the marginal note of a previous section the word is "punishment," and not "penalty." The latter word is in the body.

Metcalfe.—In the previous Bankruptcy Acts the very same word "penalty" has been held by the judges to have only a pecuniary signification, and that it did not apply to a criminal offence. The learned counsel then referred to *Reg. v. Swan* (4 Cox Crim. Cas. 108), where Coleridge, J., and Rolfe, B., had expressed an opinion to that effect; and to *Reg. v. Nairn* (4 Cox Crim. Cas. 115), where Patteson and Talfourd, JJ., had held that an indictment could not be maintained where similar words were used, in the 12 & 13 Vict. c. 106, ss. 1, 4, with a slight difference in wording, including all matters necessary for keeping alive any proceedings in bankruptcy. In the judgment of the four judges mentioned, it was held that the word "penalty" did not apply to offences; the words "recovery and application" would not have been used if it had been intended to be so applied. The last statute said, "any penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done." Did that mean any offence for which a man might be imprisoned or sent to penal servitude? Why did the clause use the words "may be incurred?" Clearly in contemplation of such an act as that of taking larger fees by the commissioner than he was authorised to receive, which would render him liable to punishment by a fine; but it did not apply to an offence punishable by imprisonment or penal servitude. The commissioner's warrant was for the purpose of arresting the bankrupt and taking him before a magistrate; then the magistrate's warrant was for the purpose of committing him to prison for the offence. If it was "penalty incurred," it must be under the old Act; but if it was a "penalty to be incurred," it came under the new Act. The words in the former statute, "any right that has arisen or may arise," were just of the same effect. There was nothing that could be incurred subsequent to the passing of the new Act. The new Criminal Consolidation Acts, which passed the same day as the new Bankruptcy Act, were drawn by gentlemen conversant with criminal law: but the other was not. The 24 & 25 Vict. c. 95, s. 3, the repealing clause, kept alive by most express words offences and penalties (committed before the commencement of the Act) which were to be dealt with and recovered in the same manner as if the said Acts and parts of Acts had not been repealed. The words "penalty" and "offence" were both used; and it

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was provided that they were to be dealt with and inquired into, determined and punished, in the same way as though the Act had not passed. It kept alive every portion of the former penalties and offences *eo nomine*. It was strange, if there really was an intention in the new Bankruptcy Act to keep alive the offence, that the same words, or some equivalent to them, were not used. There the word "penalty" was used in contradistinction to the word "offence." In the court below attention was drawn to the fact that both the Acts provided that persons guilty of perjury before the Bankruptcy Court should be subject to the "pains and penalties" of perjury. The offence was punished by the common law with fine, and by the statute with imprisonment.

ERLE, C.J.—I well remember when every prisoner convicted of perjury was sentenced to be fined 1s. and then to be transported also for seven years. For the common law offence the prisoner was fined 1s., and for the statutable offence he was punished with transportation in addition.

Metcalfe.—In Sir Robert Peel's Act, the same provisions were inserted as are introduced into the Criminal Consolidation Acts in express terms, because the Legislature thought them necessary to keep alive the offence. Rolfe, B., said that upon the principle now contended for by the other side, a man might be hanged for an offence whilst there was a statute in force declaring that he should not be tried for it. It was not right to speculate upon what was intended to be done by the Legislature. They had no right to take judicial notice of a marginal note in a book, although the handwriting was recognised by the court. Their Lordships must be guided by the words of the Legislature and nothing else. Its intention even may have been frustrated by what took place in Parliament. The judgment of Lord Tenterden in *Surtees v. Ellison* (9 B. & C. 750), was not unimportant. There it was held that when an Act repealed the previous statutes, they were to look at the existing statute as though it had been the first Act ever passed on the subject of bankruptcy. The indictment in *Reg. v. Swan* was founded upon a section of the 5 & 6 Vict. c. 122, which made the non-surrender to bankruptcy an offence punishable with transportation for life, or for not less than seven years; but that upon which the present indictment was founded reduced the same offence to a misdemeanor punishable with a maximum imprisonment of three years. The case drawn up for the consideration of the Court stated that the prisoner had been found guilty of "felony," and the question is whether he has been rightly so convicted of that offence. Under what law has he been convicted of felony? Supposing the words "proceeding pending" kept alive an offence; what was it? Not felony, but misdemeanor. There were other authorities bearing upon the same point, and amongst them that of *Reg. v. Mackenzie* (Russ. & Ry. 429), and *Reg. v. Austin* (1 Car. & Kir. 621); the latter was upon a charge of night-poaching, and the question was, whether the offence had been committed within twelve months from the date of the prosecution. The Lord Chief Baron there

said that the warrant must be held to show the commencement of the prosecution. In the present case, however, the warrant of apprehension may have been for fifty other purposes besides that of prosecuting. The prisoner was not apprehended and taken before a magistrate prior to the new Act passing. It could not be said to be the same "proceeding pending" which was afterwards brought before the Central Criminal Court.

WILDE, B.—The statute alludes to taking criminal proceedings against a man.

Metcalf.—But the "proceedings" must be the same as those "pending," whereas the indictment under which the prisoner was tried was quite new matter, having nothing to do with the previous "proceedings pending."

Parry, Serjt., rose to reply, but

ERLE, C.J., intimated that they need not trouble the learned gentleman, to whom, however, the Court always listened with the best attention. His Lordship was of opinion that the conviction of the prisoner was legally right. By the 12 & 13 Vict. c. 106, s. 251, he had been guilty of felony in not surrendering to his bankruptcy. Under the powers conferred by that statute the Commissioner had issued a warrant for the prisoner's prosecution for that crime, in respect of which an information had also been laid before a magistrate, in pursuance of which, and prior to the present Act coming into operation, the magistrate issued his warrant for the prisoner's apprehension. Before the indictment was framed the 12 & 13 Vict. was repealed by the 24 & 25 Vict. After the latter statute was passed, the indictment was preferred under which the prisoner was convicted. Sect. 230 of that statute was what the Court had to construe upon the present occasion. By it the 12 & 13 Vict. was repealed, as far as concerned certain offences. Mr. Metcalfe's argument was perfectly just, and his Lordship went with it to the fullest extent, except as to his view of what was the effect of the saving clause. The statute was repealed, and with it the offence would have gone, and, of course, all proceedings in respect of it with it, had not the saving clause prevented the effect of that repeal. The excepting part of the section was in these words: "Such repeal shall not affect any proceeding pending, or any penalty incurred in respect of any act, matter, or thing done or existing prior to or at the commencement of this Act." Now, was there a "proceeding pending," and was there a "thing done" before the commencement of this Act? I answer both questions in the affirmative. First, was there a "proceeding pending" in respect of a "thing done" before the commencement of this Act? The "thing done" by the bankrupt was feloniously abstaining from surrendering to his bankruptcy; that was the "thing done." Secondly, was there a "proceeding pending" in respect of it at the time? These were the matters I mentioned—the issue of the warrant of the Commissioner, the information laid before the magistrate, and the warrant of the magistrate for the prisoner's apprehension. To my mind these are all steps taken

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towards one thing, which comes to its completion by indictment, conviction and punishment of the prisoner. The crime has been committed, proceedings are taken for the purpose of bringing the criminal to justice, and such acts as I have mentioned are all of them steps which were brought to a consummation by indictment and conviction. It seems to me, then, to be within the meaning of this statute. The warrant of the commissioner, the information before the magistrate, and the warrant of the magistrate, were all parts of a "proceeding pending," and the last part of that line of a "proceeding pending" was the indictment founded thereon. That section of the statute, therefore, I think does apply to the case. I should also take it in conjunction—because it is all in the same sentence—with the words "penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done, or existing prior to or at the commencement of this act," as being excepted by that repeal. I think it extends to all the penal consequences by law due to an offence, and not to a pecuniary penalty only. How stands the matter with respect to a "proceeding pending?" In my opinion the words of a statute are to be construed in a great degree by reference to the statute itself. It is useful, in giving a meaning to the words, to consider what was the state of the law at the time when the new statute passed, what is apparent from the statute itself, what has been the purpose of the law that comes in question, and then, bearing those points in mind, to construe the words about which the doubt arises. The state of the law was this, the 12 & 13 Vict. created several offences; and the effect of the new statute was to abolish them, and substitute a new set of proceedings, to take effect after the time that the Act should come into operation. What would be the purpose, if the repeal instead of being absolute was qualified? I take it, it would be qualified, certainly in respect of all rights which might arise. Why is it not then to be intended to apply to all liabilities that may have been incurred before the repeal should come into operation? According to the contest Mr. Metcalfe, all inchoate proceedings—any proceeding in respect of a felony, or by way of indictment—were rendered null, and impunity was given for all offences which previously were punishable. I cannot find any rational ground upon which I can come to the conclusion that the Legislature intended to give such impunity, or to stop proceedings that were begun for the prosecution of an offence, before the guilt of the party was inquired into, and before, if found guilty, retribution was suffered for the offence. The repeal is not to affect any "proceeding pending." In an ordinary action for malicious prosecution, the information before a magistrate, the warrant to apprehend the party, and the indictment, are all steps in the proceedings for the prosecution. It is the constant experience of those conversant with such proceedings that the action may lie in respect of a warrant, it may lie in respect of an information, and it may lie in

respect of an indictment founded thereon; that it may lie in respect of either of them, and that all the others may have been taken with reasonable and probable cause, and the last step without it. It is constantly in the course of experience that they are all taken as a series of proceedings constituting the prosecution of the criminal upon the charge—all necessary steps to be taken in prosecution before the indictment. So much as to the branch of the argument that the indictment is not a "proceeding pending" at the time of the repeal. Then as to the other branch of the argument, respecting the penalty incurred and about to be inflicted upon the prisoner in respect of a felony committed before the repeal, whether that is a "penalty incurred" in respect of a "thing done" prior to the repeal coming into operation. To my mind those words are capable of meaning not merely a pecuniary, but any penalty or punishment. "The last penalty of the law" has been adverted to as a phrase indicating the highest punishment that can be inflicted—words certainly capable of being applied to any penalty consequent on any offence. "Penalty" applies to the punishment of death, to penal servitude, to imprisonment, fine, or any infliction which may accrue upon an offence. It seems to me that the intention of the Legislature, notwithstanding the repealing part of the Act, was to leave the responsibility of the bankrupt as it was before the Act came into operation. We have been pressed very much with the fact adverted to that the same or similar words are to be found in other statutes. I say again that every statute is to be construed very much by reference to the state of the law at the time when it came into operation, and the purpose of the law must be construed in a very great degree by the words contained in the statute itself. In respect to the cases founded on the 12 & 13 Vict., the same clause there speaks of the "recovery and application" of the penalty. The recovery and application of any penalty was, it is said, in the nature of words signifying rather a pecuniary penalty recovered and applied than an infliction of punishment. I say again that the words are to be construed by reference to the statute itself, and that no "proceeding pending" in respect of any "thing done" and no "penalty incurred in respect of any thing done" is to be affected by the repealing section. In sect. 221 some of the offences of which the bankrupt may be guilty under the statute are provided for, and the words of that section are, "From and after the commencement of this Act, any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute"—felony, misdemeanor, or penalty, as the case may be. The Legislature, at the time when they were drawing this act, said, virtually, "For the future the bankrupt

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shall be liable in respect of any acts or things following;" and with respect to the old law, "the repeal shall not affect any proceedings pending, or any penalty incurred in respect of any act or thing done before the repeal of the old Act." For the future they are to be proceeded against under this section. But for acts before the repeal came into operation, and the penalties incurred in respect of them, they shall be inflicted according to the provisions of the former statute." I observe that in the cases which have been before decided upon other statutes, such as the game laws, and treason by coining, the issuing of the writ for the apprehension of the parties has been considered as a continuation of the proceedings, the warrant beginning and the indictment terminating the "proceedings pending;" so that it seems to me that I should not lay much stress on those decisions founded on other statutes, because I think that the ground of construction of each statute ought to be state of the law at the time it was brought into the Legislature and the purpose of the Legislature in bringing in the statute, and then the construction to be put on the words, if very usual words, or if capable of a variety of meanings, that the one ought to be chosen which most consists with the purpose of the Legislature, and with the whole statute, taking it in connection with the state of the law at the time; and taking this statute in connection with the state of the law at the time it was passed, and the purpose of the Legislature, I am clearly of opinion that there can be no rational reason assigned why all the criminals under the last statute should have an immunity, and that absolutely all proceedings should be rendered null, and that a man committing an offence under this Act shall not be reached by a penal indictment. No rational purpose can be suggested for giving to the words the meaning which Mr. Metcalfe has dwelt upon, as taken by themselves without any reference to the rational purpose of the Legislature. Without that rational purpose they are incapable of the meaning which he has given to them; but, in my humble judgment, having reference to the rational purpose of the Legislature, and the state of the law at the time of the enactment, they are capable of the meaning I have given to them, and for that reason I am of opinion that the conviction must be sustained.

BLACKBURN, J.—I am of the same opinion. The 230th section enacts, "that the Acts and parts of Acts set forth in schedule G. to the extent to which they are therein expressed to be repealed, and all other Acts or parts of Acts which are inconsistent with Acts that are repealed, but such repeal shall not affect any proceeding pending, or any right that has arisen or may arise, or any penalty incurred or that may be incurred in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of that Act under or by virtue of any of the Acts or parts of Acts repealed. Under that section the part of the 13 & 14 Vict. c. 106, which created the felony of which the prisoner was found guilty, is repealed. I perfectly agree with the decision in *Reg. v. Nairn*, that if that provision had been

simply repealed, the felony would no longer be in existence; but the section reserves power to proceed in respect of existing crimes, which would be otherwise done away with. The first question is, was this a proceeding pending? Now, I think it was the intention of the Legislature, by this saving clause, to prevent criminals going free. The word "penalties" used by the draftsman is large enough to extend to all kinds of punishments, whether pecuniary or affecting life or limb, or any other. In *Reg. v. Nairn* the decision turned on the effect of the words in the saving clause of the repeal section of 12 and 13 Vict. c. 106, and that clause was held only to apply to summary proceedings under which a penalty could be awarded. The context there showed that the Legislature was speaking of penalties of the same kind, and not of penalties in the nature of imprisonment or penal servitude. In the present act there is nothing in the context or act to show that the test was intended to be, whether the penalty was of a pecuniary nature or not, but the words of the section will apply to every kind of penalty. For the reasons given by the Lord Chief Justice, it seems to me that the Legislature by this enactment never supposed that criminals who had committed offences were to be set free, but that in future a different code was to prevail.

KEATING, J.—I am of the same opinion. The question is not whether more apt words might not have been used for keeping alive the provisions in the old Act relating to offences, but whether the words used in the new Act are sufficient for that purpose; and, for the reasons already given, I am of opinion that they are sufficient.

WILDE, B.—I am of the same opinion. I have been very clearly of opinion all through the discussion that the prisoner was rightly convicted, and that under the words "proceeding pending" the Legislature might fairly be deemed to include such a case as the present. I should expect to find very strong words if it had been intended to let free all persons who had previously offended against the provisions of the former act. In *Willace's* case (1 East, P. C. 186), where the question was, whether the prosecution had been commenced within time, the Judges unanimously held, that the information and proceeding before the magistrate were the commencement of the prosecution within the meaning of the statute; and so in *Reg. v. Brooks* (1 Den. C. C. 217), the information and warrant were held the commencement of a prosecution for night-poaching, under 9 Geo. 4, c. 69. These cases are authorities for saying that the information and warrant are parts of a proceeding pending in the present case. The second point is equally plain. The term "penalty" is broad enough to include criminal punishment. The 12 & 13 Vict. c. 106, s. 254, in dealing with the offence of perjury, uses the words "shall be liable to the penalties of wilful and corrupt perjury."

MELLOR, J.—I am of the same opinion. The section relied on, when taken in connection with the other sections of the Act, clearly was not intended to affect existing liabilities.

Conviction affirmed.

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COURT OF QUEEN'S BENCH.

January 20, 1862.

(Before COCKBURN, C.J., CROMPTON, BLACKBURN, and
MELLOR, JJ.)

REG v. ALLEN. (a)

*Criminal prosecution—Entering a nolle prosequi on the part of the Crown
—Jurisdiction.*

Where, in an indictment for perjury, the Attorney-General enters a nolle prosequi on the part of the Crown, he does so on his own responsibility, and this Court will not interfere.

THIS was an application for a rule calling on the defendant William Allen, to show cause why the prosecutor, Francis James Gregory, should not be at liberty to proceed to the trial of two indictments for perjury which had been found against the defendant at the Central Criminal Court, and since removed into this Court by *certiorari*.

It appeared that Gregory, the prosecutor, had formerly been an out-door officer of the Customs, and in the month of September 1860 a charge was brought against him by Allen, the defendant, for stealing spirits in conjunction with him (Allen) the informer. The case was fully investigated before Mr. Gray, a Commissioner of Customs, and upon that occasion Allen stated that the offence was committed on the 11th November, 1859. On Gregory being called on for his defence, he requested that time might be allowed him to produce his witnesses, and the case was thereupon adjourned for that purpose until the 13th September. A book was kept at the Custom-house, in which was entered the manner in which the out-door officers were employed, with the statement of the time and the duties in which they were occupied, and Gregory applied for permission to inspect this book, to trace his

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

occupation on the day and at the time alleged, but he was refused, though he now stated in his affidavit that he had been informed that Allen had in the interval between the hearings before the Commissioner applied for and been permitted to inspect the book. When the inquiry was resumed before the Commissioner on the 13th September Allen repeated his previous statement, and swore that what he had then deposed was correct, except as to the date on which the alleged offence was committed, which he said ought to have been the 18th April, 1860, instead of the 11th November, 1859.

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Witnesses were then examined on both sides, and in the end Gregory and ten others were dismissed from their employment by the Commissioner of Customs.

Gregory and the ten others who had been so dismissed then memorialized the Board of Customs, and prayed that they might be indicted, and so have the charge tried before a jury, but that application was refused.

On the 18th September the parties went before the Lord Mayor at Guildhall, and made a charge of perjury against Allen. The Solicitor of the Customs appeared, and defended Allen, and in consequence of some discrepancy in the evidence of a boy called as one of the witnesses for the prosecution, the Lord Mayor said he thought it very improbable that a jury would convict, and refused to commit the accused. Gregory and the other ten men then proceeded to prefer an indictment against Allen, and eventually true bills were found on two indictments at the Central Criminal Court, and the defendant Allen was taken into custody and brought before the Lord Mayor; he was again represented by the Solicitor for the Customs, and ultimately was discharged on his own recognizances.

The indictments were then moved into this Court by *certiorari*; but when a rule was applied for the defendant to come in and plead, it was discovered he had not entered into any recognizances, and that the Attorney-General had entered a *nolle prosequi*.

J. J. Powell in support of the application. [COCKBURN, C. J.—Upon what ground do you ask us to interfere with the undoubted right of the Attorney-General to enter a *nolle prosequi*?] Upon the ground that the Attorney-General has acted on an *ex parte* application. The Attorney-General has no power to enter a *nolle prosequi* without calling before him and hearing all the parties. [COCKBURN, C. J.—If it be shown to the Attorney-General that he has been misled, no doubt he will set the matter right. BLACKBURN, J.—It will be difficult to show that this Court has power to interfere with the prerogative right of the Crown as exercised by the Attorney-General.] The course adopted in this case is contrary to the ordinary practice: (Crown Circuit Companion, 22; 2 Gude's Crown Practice, 550.) [CROMPTON, J.—Do you say that the Crown could not pardon without an inquiry? The authorities you refer to mean to say that the prosecutor cannot enter a *nolle prosequi* without the Attorney-General, for fear of

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collusion and the compounding of felony. COCKBURN, C. J.—There is nothing to prevent the Attorney-General entering a *nolle prosequi toties quoties*. The Attorney-General is the great public prosecutor for the State, who ought to be at liberty to act upon his own sense of public duty. Do you find any case in which the Court interfered after the Attorney-General had entered a *nolle prosequi*?] There is no direct authority; but it is contended that this *nolle prosequi* has been entered irregularly: (*R. v. Evelyn*, Trin. Vac. 1820.) Then, assuming that the Attorney-General has such a power, still a *nolle prosequi* is only a temporary proceeding, and this Court may order the proceedings to continue without a fresh indictment; although it is a stay, the indictment is not quashed, and a prosecution may be continued on it (*Goddard v. Smith*, 6 Mod. Rep. 262; *Stretton and Taylor's case*, Leonard's Rep. 119; *R. v. Ridpath*, 10 Mod. Rep. 152.)

COCKBURN, C. J.—I am of opinion that in this case there should be no rule. It is the undoubted right and power of the Attorney-General, as the representative of the Crown in matters of criminal law, to enter a *nolle prosequi*, and thereby at once to stay proceedings in a criminal suit or information; and no instance has been cited, nor can any be found, in which the Court, after a *nolle prosequi* had been entered by the Attorney-General, has taken upon itself to direct such proceedings to be prosecuted. Even if this Court should do so, there is nothing to prevent the Attorney-General from entering a *nolle prosequi toties quoties*. It is not for this Court to create a precedent of this sort where none before existed—a precedent contrary to the understanding of the profession, and one that would be fraught with public mischief. Under ordinary circumstances, no doubt, the Attorney-General would act wisely in calling the prosecutors before him before he proceeded to enter a *nolle prosequi*; but there may be particular cases in which, from the knowledge of the facts, or the particular nature of the charge, the Attorney-General might think it necessary to enter a *nolle prosequi* without adopting that course. It cannot be contended for one moment that there can have been any abuse exercised by one whose functions are of so highly a responsible character; but if there had been—and I only put it hypothetically—the remedy is not by an application to this Court to interfere by the exercise of its undoubted power and prerogative, but to hold him responsible before the High Court of Parliament. I am not at all disposed to establish a precedent in such a case, and I think therefore there should be no rule.

CROMPTON, J.—I am of the same opinion. I think we have no power to do what is now asked of us, and I think we ought not to interfere with the undoubted power of the Crown vested in the Attorney-General. There is nothing in the present case to take it out of the general rule. I think the Attorney-General can interfere in any public prosecution whenever he pleases, and all the cases referred to are clearly distinguishable from such a case as this.

BLACKBURN, J.—I am of the same opinion. This particular branch of the Prerogative is entrusted to the Attorney-General, who, on his own responsibility, determines whether the prosecution shall go on or not.

MELLOR, J., concurred.

Application refused.

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COURT OF CRIMINAL APPEAL.

January 25, 1862.

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ.,
WILDE, B., and MELLOR, J.)

REG. v. SHEPHERD.(a)

*Misdemeanor—Parent and child—Neglect to provide medical assistance
for daughter.*

The prisoner's unmarried daughter, aged eighteen, having for some time previously gone out to service, and occasionally returned to live with her mother and stepfather, at such times working at glove-making in order to earn her subsistence, was confined with child at her stepfather's house, and the prisoner, her mother, purposely neglected to procure a midwife or other proper person to attend her daughter when she was taken in labour, and by reason thereof she died in childbirth:

Held, that there was no legal duty on the prisoner to procure proper assistance under the circumstances, and therefore that she was not guilty of manslaughter.

CASE stated for the opinion of this Court by Williams, J.

The prisoner was indicted for the murder of her daughter Mary Ann Ashton, and tried before me at the gaol delivery for the county of Devon, in December last.

The case for the prosecution was, that the prisoner having, great ill-will towards the deceased, had purposely neglected to procure a midwife, or other proper person, to attend her daughter when she was taken in labour; and that, by reason thereof, she died in childbirth. She was about eighteen years of age and unmarried.

The prisoner, nearly four years before the trial, had married a second husband, who was not the father of the deceased. After

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the marriage, the deceased lived with her stepfather and mother for some time, and then went out to service, occasic returning to live with them when she was out of place, at such times working at glove-making in order to earn her sistence. About the beginning of the harvest before her (which took place on Oct. 26, 1861) she came back from serv her stepfather's house, and continued to reside with her mothe her stepfather and their family till she died, except that she absent staying with an aunt near Bridgwater for about six w whence she returned to her stepfather's house on Tuesday and tinued there till the following Saturday, when she died.

At the close of the case for the prosecution it was objected b counsel for the prisoner that she was under no legal duty or gation to procure, or try to procure, the attendance of a mi for her daughter, and therefore that she was not criminall sponsible for neglecting to do so.

I told the jury to consider whether it was established b evidence that the death of Mary Ann Ashton was attributaf the prisoner's neglect to use ordinary diligence in procurin assistance of a midwife or other proper attendant, and if it not so established, to acquit the prisoner. But if it was so e lished, then to consider, secondly, whether, by so neglecting intended to bring about the death of her daughter, and if so, the jury to convict her of murder, but if not of manslaughter.

The jury convicted her of manslaughter, but I respited judgment in order to obtain the opinion of this Court whethe objection to the conviction was well founded.

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H. T. Cole for the prisoner.—The conviction cannot be susta There was no legal obligation on the prisoner to procu attempt to procure a midwife for her daughter. [WILLIAMS, The view adopted by the jury must be taken to be that, i deceased had had the assistance of a midwife of ordinary her life would have been saved.] The sole question now is there a legal duty on the part of the prisoner to procure or att to procure for the deceased such assistance? Before the Act plifying the forms of indictments, the act by which the pri destroyed the life of the deceased must have been shown o face of the indictment; in this case the duty must have been s and also that the prisoner had the means of complying wit [WILLIAMS, J.—If the indictment had stated the facts, it v have been quite sufficient, and so now the question is, the facts create the duty?"] The duty must arise, if a from the relation of the parties, or by virtue of a con Here there was no duty arising from contract, and it is subn that there was no legal duty on the prisoner as the mother o deceased, who was an emancipated child, or her husband s stepfather. The obligation imposed by the stat. 43 Eliz. on tions to support one another, extends only to blood relat

(*Rex v. Munden*, 1 Stra. 190.) And it has been expressly held that a stepfather is not bound to support his wife's children by the first marriage: (*Cooper v. Martin*, 4 East. 76.) Then the 4 & 5 Will. 4, c. 76, s. 57, fixes the age of sixteen as that up to which time a stepfather shall be bound to support the children of his wife by a former marriage. If there is no obligation after that age to supply food, *a fortiori* there is no obligation to find medical assistance. In *Rex v. Friend and Wife* (Rus. and Ry. 20), the neglect to supply an apprentice of tender years with sufficient food was held to be indictable on the ground that there was a breach of duty created by contract. In *Rex v. Squire and Wife* (1 Russ. on Crimes, 19), where the prisoner was charged with murder of an apprentice, who died from debility, and from want of proper food and nourishment, a married woman was held not to be responsible for not providing an apprentice with sufficient food and nourishment, though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withholden it from him, she would have been. That decision has been since acted on in *Rex v. Saunders* (7 C. & P. 277), and *Reg. v. Edwards* (8 C. & P. 611). There is no allegation in this case that the prisoner prevented her daughter from obtaining medical assistance. [WILLIAMS, J.—The verdict must be taken finding that the prisoner might have got a midwife if she pleased. There were two living near the spot, and one did come when sent for.] Again, there was no evidence that the prisoner had the means of providing such assistance. In *Reg. v. Chandler* (1 Deas. C. C. 453; 6 Cox Crim. Cas. 519), an indictment for neglecting to provide an infant with sufficient food alleged that the prisoner, who was the mother of the child, had the means of doing so; it was not proved that she actually had the means of doing so, but only that she might have obtained relief by applying to the relieving officer, and it was held that this was not sufficient to support a conviction. And in *Reg. v. Hogan* (2 Den. C. C. 277; 5 Cox Crim. Cas. 255), it was held that an indictment for abandoning a child without having provided any means for its support should state that the prisoner had the means of supporting the child.

Carter (M. Bere with him) for the prosecution.—The jury have found criminal neglect on the part of the prisoner, and it is submitted that there was a duty on the part of the prisoner sufficient in law to sustain the conviction. There is a natural duty recognised by law in parents to support their children (2 Steph. Black. 296-7; 43 Eliz. c. 2, s. 7; 4 & 5 Will. 4, c. 76, s. 56); and there is no time pointed out when that duty is to cease. If parents have not the means of providing proper food and nourishment for their infant children, who are incapable of taking care of themselves, it is their duty to apply for parochial assistance, and therefore when a married woman, who having a child under such circumstances, wilfully neglected for several days going to the union for the purpose of getting support for it, she knowing that such neglect was likely to cause the child's death, she was held to be guilty of manslaughter: (*Reg. v. Mabbett*, 5 Cox Crim. Cas. 339.) [ERLE,

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C. J.—The proposition I am reported to have laid down in that case contemplates death, which I apprehend was a tolerably safe proposition.] In *Reg. v. Middleship* (5 Cox Crim. Cas. 275), upon an indictment against the prisoner for the manslaughter of her new-born child, which had dropped from her whilst on the privy and had been smothered in the soil, it was hinted that if the jury were of opinion that after it had been born the mother had the power of procuring such assistance as might have saved the child's life, and she neglected to procure it, she was guilty of manslaughter. The following cases were also quoted: *Reg. v. Marriott*, 8 C. & P. 425; *Rex v. Cheeseman*, 7 C. & P. 455; *Rex v. Ferguson*, 1 Lew. C. C. 181; *Rex v. Walters*, 1 Rus. on Crimes, 488; *Rex v. Huggins*, 2 Stra. 882; *Rex v. Simpson*, 1 Lew. C. C. 172.

ERLE, C. J.—We are to consider whether, on the facts in this case, there has been an omission of duty on the part of the prisoner, making the prisoner liable to the felony of manslaughter. It is extremely important that the boundaries of crime should be defined as far as they reasonably can be, and it is obvious that there is very much indefiniteness in the use of the terms neglect and want of ordinary care. Taking the facts to be that the prisoner did not ask for the aid of a midwife at a time when her daughter was suffering the pains of childbirth, and in the course of which a difficulty occurred, which terminated in her death, was that a breach of duty for which she is responsible, in a Criminal Court, for not asking a midwife to come and attend her daughter? If she had used ordinary care, she might have known where a midwife was to be found, and who would have come; but there is no evidence that she had any means at her command to pay for such professional aid. It cannot be a ground of indictment that she failed to ask for aid which might, perhaps, have been given without her incurring any expense. In a great many cases childbirth occurs without the necessity of any professional aid at all. It is enough to say that this case does not fall within any of the authorities or the principle of them. In the case of persons imprisoned, and who are under the care of those who have the custody of them, there is a duty cast by law on the part of those who have such custody to provide them with all necessaries, and so in respect of the relation of parent and child, and some other cases. So also where the relation by contract of master and apprentice exists, the same duty may arise. But in this case the relation is that of a parent and daughter beyond the age by which a duty is cast by the statute to maintain and support her, the daughter being entirely emancipated. In my judgment therefore the question must be answered in the negative, as I cannot find any authority or principle according to which the prisoner has been guilty of a breach of duty, making her criminally responsible.

WIGHTMAN, J.—I am of the same opinion. I put my judgment on the ground that the circumstances stated do not show any legal duty to do that for the omission of which the prisoner was charged.

WILLIAMS, J.—I am of the same opinion. No doubt, morally speaking, the prisoner has been guilty of a shocking crime, but not of a legal one.

WILDE, B., and MELLOR, J., concurred.

Conviction quashed.

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SHEPHERD.

1862.

*Manslaughter
—Neglect to
procure
medical
assistance.*

COURT OF QUEEN'S BENCH.

February 22, 1862.

(Before WIGHTMAN and CROMPTON, JJ.)

GALLIARD (Appellant) v. LAXTON (Respondent). (a)

Police constable—Arresting a person—Possession of warrant—Assault—Rescue.

A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all Her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G. and convey him before two justices of C., to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station-house. W. G. was rescued by several persons, who assaulted the constables, whereupon informations for the rescue and assault were laid against the parties by the constables, and at the hearing before justices, the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted:

Held, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time.

Held also, that the withdrawal of the information as to the rescue was no bar to proceeding with the complaint as to the assault.

CASE stated for the opinion of this Court upon a summary conviction by Justices.

On the 3rd of July last two informations were laid before the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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1862.

Arrest—
Possession of
warrant.

Rev. Thomas Brooke, a magistrate of the county of Chester, against Charles Galliard, of Monks Coppenhall, in the county of Chester.

The information No. 1 was as follows:—

County of Chester, } The information and complaint of Charles
to wit. } Laxton, of the township of Nantwich, in
the said county of Chester, superintendent of police, taken and
made upon oath this third day of July, in the year of our Lord one
thousand eight hundred and sixty-one, before me the undersigned
Thomas Brooke, clerk, one of Her Majesty's Justices of the peace
in and for the said county, at the township of Wistaston, in the
said county of Chester, who saith that he hath just cause to believe
and suspect, and doth believe and suspect, that Charles Galliard,
John Galliard, Louisa Galliard, and Margaret wife of Charles
Galliard, of the township of Monks Coppenhall, in the said county,
on the first July, in the year aforesaid, at the township of Monks
Coppenhall aforesaid, whilst one William Galliard was in the
lawful custody of one Henry Dyson, a constable, under and by
virtue of a warrant under the hand and seal of Thomas Brooke,
clerk, one of Her Majesty's justices of the peace in and for the said
county, for arrears in bastardy, unlawfully, forcibly, and feloniously
did rescue the said William Galliard out of the said custody of the
said Henry Dyson, and him the said William Galliard did put at
large to go whithersoever he would against the form of the statute in
such case made and provided, and against the peace of our Lady
the Queen, her crown and dignity; and thereupon this informant
prayeth that the said Charles Galliard, John Galliard, Louisa
Galliard, and Margaret Galliard may be apprehended for the said
offence, and dealt with according to law.

(Signed) CHARLES LAXTON.

Sworn, &c.

Information No. 2 was as follows:—

County of Chester, } Be it remembered that on the 3rd of July
to wit. } 1861, at Wistaston, in the said county of
Chester, Charles Laxton, of Nantwich, in the said county of
Chester, superintendent of police, personally cometh before me
Thomas Brooke, clerk, the undersigned, one of Her Majesty's
Justices of the peace in and for the said county of Chester, and
upon his oath informeth me that from information received Charles
Galliard, John Galliard, Louisa Galliard, and Margaret the wife
of Charles Galliard, of the township of Monks Coppenhall, in the
said county of Chester, within the space of three calendar months
last past, to wit on the 1st of July, 1861, at the township of
Monks Coppenhall, in the said county of Chester, unlawfully did
assault Henry Dyson and John Sharman, of Monks Coppenhall,
police constables, contrary to the form of the statute in such case
made and provided, wherefore the said Charles Laxton prayeth
the consideration of me the said Justice in the premises, and that

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the said C. Galliard, J. Galliard, L. Galliard, and M. Galliard may be apprehended and brought to appear before me and answer the premises and make their defence thereto.

Taken and sworn before me,

THOMAS BROOKE.

(Signed) CHARLES LAXTON.

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Upon both of which informations warrants were issued, and the defendants were brought up before the undersigned magistrates on the 5th July, 1861, at a petty sessions held at Nantwich, when the complainant withdrew the information No. 1, but proceeded with the information No. 2. It was proved by evidence that a warrant for arresting W. Galliard, the defendant's brother, was issued on the 8th September, 1860, and was as follows:—

County of Chester, } To the Constable of the township of Nant-
to wit. } wick, in the county of Chester, and all
Her Majesty's officers of the peace in and for the said county
whom these may concern. Whereas information and complaint
have been made upon oath before me, T. Brooke, clerk, one of
Her Majesty's justices of the peace for the county of Chester, the
8th September, 1860, by Eliza Lowe, of the township of Nant-
wich, in the county of Chester, single woman, that by an order
made under the authority of the statute passed in the 8th year
of the reign of Her present Majesty, intituled "An Act for the
further amendment of the Laws relating to the Poor in England,"
at the petty sessions holden in and for the division of the hundred
of Nantwich, in the county of Chester, on the 7th August, 1860,
by Her Majesty's justices of the peace in and for the said county,
acting in and for the said division then and there assembled,
William Galliard of the township of Monks Coppenhall, in the
county of Chester, puddler, was adjudged to be the putative father
of a bastard child, then lately born of her body, and that in and
by the said order it was ordered that the said William Galliard
should pay to her, the said Eliza Lowe, so long as she should live,
and should be of sound mind, and should not be in any gaol or prison,
or under sentence of transportation, or to such person who might be
appointed to have the custody of such bastard child, under the
provisions of the said statute, the sum of 1s. 6d. per week until
such child should attain the age of thirteen years, or should die,
or she the said mother should marry, and the sum of 5s. for the
midwife, and the sum of 2l. 4s. for the costs incurred in the obtain-
ing such order; and that the said William Galliard hath had due
notice of the said order, and that the said bastard child is now
living under the age of thirteen years, and that she, the said
mother, hath not been married since the said order was made, and
that the payments directed to be made by the said order have not
been made according thereto by the said William Galliard, and
that there is now in arrear for the same the sum of 19s. 6d., being
the amount of arrears for thirteen weeks' payments, and 5s. for the
midwife, and the sum of 2l. 4s. for the costs incurred in obtain-

GALLIARD - ing such order. These are therefore in Her Majesty's name to
 v. command you, the said constable, or other officers of the peace,
 LAXTON or some or one of you, forthwith to apprehend the said William
 — 1862. Galliard, and convey him before two of Her Majesty's justices of
 — the peace in and for the said county of Chester, to answer the
 Arrest— premises, and to be dealt with according to law. Given under
 Possession of my hand and seal, at Nantwich, in the county of Chester, this 8th
 Warrant. day of September, 1860. (Signed) THOS. BROOKE.

This warrant was given to the superintendent of police, and by him given to the police at Monks Coppenhall, and it had been in the possession of police constable Dyson.

On the night of the 1st July, 1861, the constables Dyson and Sharman being on duty in their uniforms as constables in Monks Coppenhall, arrested defendant's brother, William Galliard, under the warrant dated the 8th September, 1860; but they had not the warrant in their possession at the time, it being then at the station-house in Monks Coppenhall, in the possession of their superior officer, Inspector Wilson.

After complainant's witnesses had been examined, the attorneys for the defendant took the following objections:—

First. That the arrest was illegal, the warrant of the 8th of September, 1860, not being in the possession of the police constables when the arrest took place.

Secondly. That the complainant having withdrawn the charge of rescue, he could not proceed with that for the assault, as the lesser offence merged in the greater one, and that the withdrawal amounted to an acquittal on the principle of *autrefois acquit*, and that he could not be retried for the same offence.

We were satisfied that the assault had been committed, and that the objections were not tenable, and we convicted the defendant in 5*l.*, including costs, and in default to be committed to Chester for two months.

The defendant's solicitors applied for a case on the two points of law under the 20 & 21 Vict. c. 43, and we agreed to grant the same, and submit for the opinion of the Court of Q. B.

First. Whether the warrant of the 8th September, 1860, having been issued in the form above set forth, and being in the hands of the police, an inferior officer of the same force, not having the warrant in his actual possession at the time of the arrest, was legally justified in arresting William Galliard?

Secondly. Whether the information No. 1 being withdrawn amounted to such an acquittal and trial that the defendant could not be tried on the information No. 2?

Dated at Nantwich, the 14th August, 1861.

THOMAS BROOKE.
 WILBRAHAM TOLLENACHE.

Gibbons for the appellant.—The conviction is bad as the arrest was illegal, the police constables not having the warrant

of September 8th, 1860, in their possession at the time of the arrest. In Lambard's *Irenarcha* 97, Edit. 1602, it is said, "There is another thing also whereof I thought meet to admonish our justices of the peace in this place. Many of them do use to give out their precepts to attach persons suspected of felony, to the end to have them brought before them, which thing is neither newly devised by them, nor done without colour, for they have such a precedent in the old book of 'Justices of the Peace,' (fol. 41). And there is no doubt but that if a felony be done every man may arrest whomsoever he suspecteth of it. But for all that the whole Court (14 Hen. 8 pl. 18) condemneth such precepts, because if the bailiff which *serveth* the warrant have suspicion of the party, he may of himself, without the warrant, arrest him; and if he have not, then is the warrant of the justice of the peace no warrant to arrest him, unless he be indicted before." So in Dalton on the Office of Sheriff, 110: "A sworn and known officer, if he will not show his warrant to the party, as he needs not, yet upon the arrest the officer ought to declare the contents of the warrant." In *Robins v. Hender*, 3 Dowl. 543, the marginal note is "*Semble*, that in order to constitute an arrest the warrant must be produced." And in *Fownes v. Stokes*, 4 Dowl. 125, the Court refused to discharge the defendant out of custody, he having been arrested by a person not having the warrant in his possession, on the ground that the application was made too late. In *Reg. v. Whalley*, 7 C. & P. 245, it was held that "if commissioners of bankruptcy issue a warrant to apprehend a bankrupt, and direct the warrant to 'J. A. and W. S., our messengers and their assistants,' &c., this warrant does not justify the apprehension of the bankrupt by any one who is not in the presence, actual, or constructive of J. A. or W. S., and therefore B., who was the assistant of W. S. in his business of a sheriff's officer, is not justified in apprehending the bankrupt in the absence of W. S. and J. A., although B. has the warrant in his possession. And it was held also that if B. in attempting to take the bankrupt be struck down by the bankrupt with a stone, and in a struggle which ensued have a part of his nose bitten off by the bankrupt, this, in case death had ensued to B. would have been a case of manslaughter only." The *Countess of Rutland's* case, 6 Co. Rep. 52; *Broadfoot's* case, Foster C. C. 154, and 1 East P. C. 307, were also cited.

No one appeared in support of the conviction.

Cur. adv. vult.

February 22nd, 1862.

JUDGMENT.

WIGHTMAN, J.—This case was argued before my brother Crompton and myself at the sittings after last term. The first question proposed to us is of much general importance, inasmuch as it may arise in cases where resistance to an arrest may be carried to the extent of wounding or killing an officer. It appears that a

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warrant had been issued by a magistrate of the county of Nantwich directed to the constable of the township of Nantwich and Majesty's officers of the peace in and for the said county manding them or some or one of them forthwith to apprehend William Galliard, and convey him before two Justices of the county of Chester to answer for the not obeying a bastardy warrant for payment of money. This warrant is stated to have been directed to the superintendent of police, and by him to have been delivered to the police at Monks Coppenhall, in the county of Chester, which place William Galliard is stated in the warrant to have been in the possession of Dyson, one of the police-constables, who arrested William Galliard, but he was not with him at the time when he made the arrest, it being at the station-house at Monks Coppenhall, and in the act of the session of the superintendent of police there. Upon the 17th of July last Dyson and another police constable of the county of Chester produced William Galliard under the warrant, but did not produce the warrant when they were asked to produce it; and the question is, whether the arrest was legal, there must at the time have been a warrant which was ready to be produced, if necessary. The warrant was not addressed to any officer by name, but to the constables of Nantwich and all the officers of the peace in and for the county generally. This general form of direction seems to be warranted by the 5th Geo. 4, c. 18, s. 6; and Dyson and the other policeman under him come within the description of persons to whom the warrant is addressed. It is no objection that what words were used by the officers at the time they made the arrest; but as no point seems to have been raised upon a question as to whether the officers informed William Galliard of the nature of the charge against him, it may be presumed they did tell him they arrested him under a warrant and what the charge was. As they were police-constables we think they were not bound, in this instance, to produce the warrant at the time they made the arrest, but as this was not a charge of felony, but rather in the nature of a civil proceeding, the warrant ought to have been produced if required, and the arrest without such production would be illegal. The production of the warrant was not, however, required before or at the time when the arrest was made, notwithstanding the resistance of the appellant and his brother, nor indeed at any time; and as the warrant was in existence at the station-house, no doubt, it could readily have been procured, it may be said that there was no reason for its being in the hands or the pocket of the officers, and that there was no disadvantage to the person arrested by reason of its being there. That, no doubt, may be so under the circumstances which are referred to in the case; but suppose it happened that after the arrest had been effected in spite of the resistance made, and before the appellant's brother had been brought to the station where the warrant was, the appellant had refused to the officer to produce it, which, not having it, he could not do, how would the case have stood then? We have already e

our opinion that, if requested, the officer was bound to produce the warrant, and if he did keep it in his custody after such request the non-compliance would not be legal, and it could hardly be contended that the arrest itself would be legal, and that the detention under the circumstances adverted to would be legal. On this view of the case, it appears to us that the officers were bound to have the warrant ready to be produced if required; if they had it not the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to the precedents, have pleaded it was delivered to them to be executed; and though it is not stated in the precedents they should have actual possession at the time of the arrest, it is to be presumed from the allegation of delivery to them that they continued to hold it. *Mackalley's case*, 9 Coke, 69a, is distinguishable on the ground suggested by Mr. East in his *Treatise on Pleas of the Crown*, Vol. I., p. 318; see also 1 Hale's *Pleas of the Crown*, 458. We are unable to find any case in which the precise point raised for our discussion has been decided. We are therefore of opinion that the officers making the arrest ought to have had the warrant with them ready to be produced in case it should be required, and that not having it they were not justified in making the arrest. As to the second point, we are clearly of opinion that the withdrawal of the information as to the rescue afforded no valid ground of objection to the proceeding under the information for the assault. Therefore the conviction will be quashed.

Conviction quashed. (a)

(a) In *Hale v. Roche*, 8 T. R. 187, Lord Kenyon, C. J. said: "If it be established as law by the cases cited that it is not necessary to show the warrant to the party arrested who demands to see it, I will not shake those authorities; but I cannot forbear observing that if it be so established, it is a most dangerous doctrine, because it may affect the party criminally in case of any resistance, and if homicide ensue the legality of the warrant enters materially into the merits of the question. I do not think that a person is to take it for granted that another who says he has a warrant against him without producing it speaks the truth. It is very important that in all cases where an arrest is made by virtue of a warrant the warrant (if demanded at least) should be produced."

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1862.

Arrest—
Possession of
Warrant.

CENTRAL CRIMINAL COURT.

October 24, 1861.

(Before Mr. Baron MARTIN.)

REG. v. POWELL. (a)

Bankrupt—Obtaining goods, &c., within three months' of filing a petition and date of fiat—12 & 13 Vict. c. 106, s. 253.

An indictment for "obtaining goods, &c., on credit within three months next preceding the date of the fiat and the filing of the petition for adjudication of bankruptcy, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade," cannot be sustained upon evidence that the petition filed was one for private arrangement, under sect. 211 of 12 & 13 Vict. c. 106, although the defendant be afterwards adjudicated a bankrupt and the proceedings adjourned into open court. The misdemeanor contemplated by sect. 253 of 12 & 13 Vict. c. 106, arises upon the filing of a petition under the 89th section of the Act.

CHAMPNEY POWELL was indicted for unlawfully obtaining goods within three months next preceding the date of the fiat, or the filing of his petition for adjudication of bankruptcy under the false colour and pretence of dealing in the ordinary course of trade.

Giffard, F. H. Lewis, and Eyre Lloyd for the prosecution.

Ballantine, Serjt. (Honeyman with him) for the prisoner.

This was a prosecution directed by Evans, one of the Commissioners of the Court of Bankruptcy in London, under the 12 & 13 Vict. c. 106, s. 253, enacting "that if any bankrupt shall within three months next preceding the date of the fiat or the filing of the petition for adjudication of bankruptcy, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit from any other person any goods or chattels with intent to defraud the owner thereof, or if any bankrupt shall within such time and with such intent remove, conceal, or dispose of any goods or chattels as

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

obtained, knowing them to have been so obtained, every such bankrupt shall be deemed guilty of a misdemeanor, and on conviction be liable to imprisonment," &c.

It appeared in evidence that the defendant filed a petition for arrangement with his creditors under the control of the court, stating his inability to meet his engagements, and praying for protection whilst proposals to his creditors were being carried into effect under the authority of the court. This was under section 211 of 12 & 13 Vict. c. 106, which enacts "that any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them under the superintendence and control of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the court in manner hereinafter mentioned, *may present a petition to the court* setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the court, on such petition, shall have power to grant such protection, and may renew the same from time to time as it shall think fit, and if the petitioner be in prison or in custody for debt may, except in the cases next hereinafter mentioned, order his immediate release either absolutely or on condition, and may take bail for his attendance at the several sittings of the Court hereinafter mentioned, provided always that the court shall not order such release, &c., and provided also that such release shall in nowise affect any rights of the creditor at whose suit such petitioner may be in prison or in custody against such petitioner, except the right of detaining him in prison or in custody whilst protected from imprisonment by order of the court." This proposal of the petitioner not being assented to by a creditor, and cause being shown, the court adjudged the petitioner a bankrupt, and adjourned the proceedings into the public court by virtue of power given by section 223 of the 12 & 13 Vict. c. 106, which enacts, amongst other things, "if at any time after the filing of any petition for protection, it shall be shown to the satisfaction of the court by any creditor, that the debts of such petitioner, or any part thereof, have been contracted by reason of any manner of fraud or breach of trust, &c., &c., it shall be lawful for the court to adjudge such petitioner a bankrupt, and to adjourn all further proceedings in the matter into the public court, and to advertise such adjudication, and appoint sittings for choice of assignees and for last examination as in bankruptcy, and such petitioner shall thenceforth *be amenable to the jurisdiction of the court in the same manner as any other bankrupt*; and any proposal which may have been made, or assented to, or confirmed, shall be wholly and altogether void, and the court shall have power at any time, on the application of any creditor, to appoint a private sitting for the purpose of such inquiry, and may summon before it such petitioning creditor, or any other person, and examine him upon oath touching such matters; and every such summons and examination

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shall be enforced in such manner as summonses and examinations are enforced in matters of bankruptcy."

At the close of the case for the prosecution,

Ballantine, Serjt.—I submit that the prisoner cannot be convicted upon this indictment. The words of the 253rd section of 12 & 13 Vict. c. 106 are, "if any bankrupt shall within three months next preceding the date of the fiat or the filing of the petition for adjudication of bankruptcy;" so involving the necessity for a petition of adjudication and an act of bankruptcy. Here there is no such petition, but a petition for an arrangement to avoid bankruptcy, and there was even no act of bankruptcy, because there was no petition for adjudication of bankruptcy against him within two months after petition for arrangement was dismissed. The 76th section of 12 & 13 Vict. c. 106 enacts, "that the filing of a petition by any such trader for an arrangement between such trader and his creditors under the provisions of this act with respect to arrangements between debtor and creditor under the superintendence and control of the court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed; provided also that no adjudication shall be made on any such act of bankruptcy unless and until after such petition for arrangement shall have been dismissed."

MARTIN, B.—The petition in this case is for protection, the petition referred to in section 253 of 12 & 13 Vict. c. 106 is a petition for adjudication of bankruptcy. This is a petition to be enabled to do something to avoid an adjudication.

Giffard (*F. H. Lewis* and *Lloyd* with him).—Although at the outset this petition took the form of a petition for arrangement, it was ultimately the proceeding upon which the petitioner was adjudicated a bankrupt, and everything done under it was to be carried on under the control and superintendence of the Court of Bankruptcy. The moment the proceedings were adjourned into open court, and the petitioner was adjudicated a bankrupt, as the adjudication followed upon the petition, the petition is to be construed with reference to the 253rd section as a petition for adjudication.

MARTIN, B.—I do not think that. We are now on a criminal case. Such a construction would be very forced even in a civil case.

Giffard.—The petitioner by his petition, a form of which is given in Schedule (Aa) of the Act, and ordered by the 212th section, states that he "is desirous of laying the state of his affairs before the court under the superintendence and control of this honourable court, and of submitting himself to the jurisdiction thereof." That being so, the commissioner adjudicates him a bankrupt; and one of the grounds which authorises the commissioner to dismiss the

petition for private arrangement and adjourn the proceedings into open court, is that there has been fraud. If the point urged on behalf of the prisoner be good, the very fraud found and acted on by the commissioner renders the prisoner not amenable to indictment.

MARTIN, B.—That is a defect in the legislation. The Legislature never contemplated such a case as this arising, and we have only to deal with the law as it stands. The petition filed by the defendant was for protection, not that he might be adjudicated a bankrupt; and I think the charge contained in this indictment, framed upon the 253rd section of 12 & 13 Vict. c. 106, cannot be sustained.

Not guilty.

Upon two other indictments against the prisoner no evidence was offered.

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Bankrupt—
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NORFOLK CIRCUIT.

BUCKINGHAMSHIRE SPRING ASSIZES.

Aylesbury, March 7, 1862.

(Before MR. BARON MARTIN.)

REG. v. THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY (LIMITED).(a)

Nuisance—Obstructing highway—Direction to jury.

A permanent obstruction on a highway, erected and placed there without lawful authority, which renders the way less commodious to the public, is an unlawful act and a public nuisance at common law, although it be not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, and although the jury may think sufficient space for the public traffic remains.

THE defendants were indicted for a nuisance in obstructing certain highways in the county of Buckinghamshire.

Mills, Q.C. (Metcalf with him), for the prosecution.

O'Malley, Q.C., D. D. Keane and Lathom Browne for the defendants.

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

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The indictment was as follows:

Buckingham } First count.—The jurors for our Lady the Queen
to wit. } upon their oath present, that the United Kingdom
Electric Telegraph Company (Limited), on the 1st day of January
A.D. 1860, and at divers times subsequent thereto, the surface of
certain common and public footway in and upon that part of the
south side of a certain turnpike-road from the town of Beacons-
field to the river Colne, all in the county of Buckingham, where
the said turnpike-road passes near to a tenement occupied by one
Thomas Osborne, near the said river Colne, being the Queen's
common highway for all her subjects to pass and repass at their
free will and pleasure, unlawfully and injuriously did dig up
and remove, and misplace, and did dig certain holes in the said footway
and placed soil, earth, and rubbish upon the surface of the said
footway, and did erect, put and place and cause to be erected, put
and placed, certain wooden posts, to wit, five with wires fastened to
both sides of the said posts upon the said footway; and from the
said 1st day of January, A.D. 1860, until the day of the taking of
this inquisition at the place aforesaid, unlawfully and injuriously
did continue, and doth still continue, these posts with wires
attached so erected, put up and placed as aforesaid, whereby the
said highway was, and is, obstructed and encumbered, and the
Queen's subjects were prevented from passing and repassing
freely and safely along the said footway as they ought, and were, and
are entitled to do, to the great damage and common nuisance of all
the Queen's subjects there residing and passing along the said road
and against the peace of our said Lady the Queen, her crown and
dignity.

Second count.—And the jurors aforesaid, upon their oath afore-
said, do further present that the United Kingdom Electric Tele-
graph Company (Limited) on the 1st day of January, A.D. 1860
and at divers other times, the surface of a certain street, called
High-street, in the town of Beaconsfield, in the county of Bucking-
ham, being the Queen's common highway for all her subjects to
pass and repass at their free will and pleasure, unlawfully and
injuriously did dig up, and remove, and misplace, and did dig certain
holes in the said street, and placed soil, earth, and rubbish upon
the surface of the said street, and did erect, put, and place, and did
cause to be put, erected, and placed, certain wooden posts, to wit,
eight with wires fastened to both sides of the said posts, upon the
said street; and from the said 1st day of January, A.D. 1860
until the day of the taking of this inquisition, unlawfully and
injuriously did continue, still doth continue, the said posts with
wires attached so erected, put up, and placed as aforesaid, whereby
the said highway was obstructed and encumbered, and the Queen's
subjects were, and are, prevented from passing and repassing
freely and safely along the said street; and they ought, and were
and are entitled to do the great damage and common nuisance of
all the Queen's subjects there residing, and along the said street
and against the peace of our said Lady the Queen, her crown and
dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), the 1st day of January, A.D. 1860, and at divers other times, the surface of a certain common and public footway in and upon that part of the south side of a certain turnpike-road leading from Beaconsfield, in the county of Buckingham, to Stoken Church, in the county of Oxford, where the said turnpike-road passes under a railway bridge of the Great Western Railway Company, being the Queen's common highway for all her subjects to pass and repass at their free will and pleasure, unlawfully and injuriously did dig up, remove, and misplace, and did dig certain holes in the said footway, and did erect, put, and place, and caused to be erected, put, and placed, a wooden post, with wires fastened to both sides of the said post on the said footway, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts with wires erected, so erected, put up, and placed as aforesaid, whereby the said highway was, and is, obstructed and encumbered, and the Queen's subjects were, and are, prevented from passing and repassing so freely and safely along the said footway as they ought, and were, and are, entitled to do to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said footway, and against the peace of our said Lady the Queen, her crown, and dignity.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), on the 1st day of January, A.D. 1860, and at divers times subsequent thereto, the surface of a certain turnpike road leading from Beaconsfield, in the county of Buckingham, to Stoken Church, in the county of Oxford, upon that part of the said turnpike road which is bounded on the south side by a stream of water, near to the town of High Wycombe, in the said county of Buckingham, being the Queen's common highway, and used by her subjects to pass and repass at their free will and pleasure, unlawfully and injuriously did dig up, remove, and misplace, and did dig certain holes in the said highway, and put and place soil, earth, and rubbish upon the surface of the said highway, and did erect, put, and place, and caused to be erected, put, and placed a wooden post, with a wire stay or support extending towards the said stream upon the said highway, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said post, with wires attached, so erected, put, and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects were and are prevented from passing and repassing so freely and safely along the said footway as they were, and ought, and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said

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highway, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), on the 1st day of January, A.D. 1860, and in divers ways and times subsequent thereto, in and upon that certain part of the turnpike road from the town of Beaconsfield to the river Colne, all in the county of Buckingham, which is situate in the parish of Denham, in the said county, being the Queen's common highway for all her subjects to go, return, pass, and repass at their free will and pleasure, unlawfully and injuriously did erect, put, place, or caused to be erected, put, and placed certain large wooden posts, to wit, seventy with wires attached to both sides thereof, upon the said part of the said turnpike road, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts, with wires attached, so erected, put, and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects are prevented from passing and repassing so freely and safely as they ought, and were, and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said highway, and against the peace of our said Lady the Queen, her crown, and dignity.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), on the 1st day of January, A.D. 1860, and in divers ways and times subsequent thereto, in and upon that certain part of the turnpike road from Beaconsfield to the river Colne, all in the county of Bucks, which is situate in the parish of Iverin, in the said county, being the Queen's common highway for all her subjects to pass and repass at their free will and pleasure, unlawfully and injuriously did erect, put, and place, or caused to be erected, put, and placed certain large wooden posts, to wit, thirteen with wires attached to both sides thereof, upon the said part of the said turnpike road, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts with wires attached, so erected, put, and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects are prevented from passing and repassing so freely and safely as they ought, and were and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said highway, and against the peace of our said Lady the Queen, her crown and dignity.

Seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), on the 1st day of January, A.D. 1860, and in divers ways and times subsequent thereto, in and upon

that certain part of the turnpike road from Beaconsfield, in the county of Bucks, to the River Colne, which is situate in the parish of Chalfont St. Peter's, in the said county, being the Queen's common highway for all her subjects to go, return, pass and repass at their free will and pleasure, unlawfully and injuriously did erect, put and place, or caused to be erected, put and placed, certain large wooden posts, to wit, fifty, with wires attached to both sides thereof, upon the said part of the said turnpike road, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts with wires attached, so erected, put, and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects are prevented from passing and repassing so freely and safely as they ought, and were and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said highway, and against the peace of our said Lady the Queen, her crown and dignity.

Eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), on the 1st day of January, A.D. 1860, and at divers ways and means subsequent thereto, in and upon that certain part of the turnpike road from the town of Beaconsfield to the River Colne, all in the county of Buckingham, which is situate in the parish of Beaconsfield in the county, being the Queen's common highway for all her subjects to go, return, pass and repass at their free will and pleasure, unlawfully and injuriously did erect, put and place, or caused to be erected, put and placed, certain large wooden posts, to wit, eighty, with wires attached to both sides thereof, upon the said part of the said turnpike road, from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts, with wires attached, so erected, put and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects are prevented from going, returning, passing and repassing so freely and safely as they ought, and were and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said highway, and against the peace of our said Lady the Queen, her crown and dignity.

Ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), on the 1st day of January, A.D. 1860, and at divers ways and times subsequent thereto, in and upon that certain part of the turnpike-road leading from Beaconsfield, in the county of Buckingham, to Stoken Church, in the county of Oxford, which is situate in the parish of Woburn, in the said county, being the Queen's common highway for all her subjects to go, return, pass and repass at their free will and

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pleasure, unlawfully and injuriously did erect, put, and place, or caused to be erected, put, and placed certain large wooden posts, to wit, thirty, with wires attached to both sides thereof, upon the said part of the said turnpike-road, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts, with wires attached, so erected, put, and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects are prevented from going, returning, passing and repassing, so freely and safely as they ought, and were and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said highway, and against the peace of our said Lady the Queen, her crown and dignity.

Tenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), upon the 1st day of January, A.D. 1860, in divers ways and times subsequent thereto, in and upon that certain part of the turnpike-road leading from Beaconsfield, in the city of Buckingham, to Stoken Church, in the city of Oxford, which is situate in the parish of Chipping Wycombe, in the said county, being the Queen's common highway for all her subjects to go, return, pass and repass at their free will and pleasure, unlawfully and injuriously did erect, put and place, or caused to be erected, put and placed, certain large wooden posts, to wit eighty-one, with wires attached to both sides thereof, upon the said turnpike-road, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts, with the wires attached, so erected, put and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects are prevented from passing and repassing so freely and safely as they ought, and were and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said highway, and against the peace of our said Lady the Queen, her crown and dignity.

Eleventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said United Kingdom Electric Telegraph Company (Limited), on the 1st day of January, A.D. 1860, and at divers ways and times subsequent thereto, in and upon that certain part of the turnpike-road leading from Beaconsfield, in the county of Buckingham, to Stoken Church, in the county of Oxford, which is situate in the parish of West Wycombe, in the said county, being the Queen's common highway for all her subjects to go, return, pass and repass, at their free will and pleasure, unlawfully and injuriously did erect, put and place, or caused to be erected, put and placed, certain large wooden posts, to wit, twenty, with wires attached to both sides thereof,

upon the said part of the said turnpike-road, and from the said 1st day of January, A.D. 1860, until the day of the taking of this inquisition, at the place aforesaid, unlawfully and injuriously did continue, and still doth continue, the said posts, with the wires attached, so erected, put, and placed as aforesaid, whereby the said highway was and is obstructed and encumbered, and the Queen's subjects are prevented from going, returning, passing, and repassing so freely and safely as they ought, and were, and are entitled to do, to the great damage and common nuisance of all the Queen's subjects there residing and passing along the said highway, and against the peace of our said Lady the Queen, her crown and dignity.

The United Kingdom Electric Telegraph Company obtained a provisional registration 26th July, 1861.

In 1850 a company, bearing the same title, was formed under the then existing law applicable to joint-stock companies, and an Act of Parliament was obtained (14 & 15 Vict. c. 107, a private Act). Sect. 15 of that Act gave power to lay down, under, along, or across a street, wires, &c., for the purpose of electric telegraph communication; but all this was conditional upon the company, which was *provisionally* registered, being *completely* registered. Never having been completely registered, this company of 1850 became defunct, as far as being able to avail themselves of the present Joint-Stock Companies Act (19 & 20 Vict.) was concerned; but the company that was provisionally registered in July, 1861, took upon themselves the title of the company of 1850, adding the word (limited), and advertised themselves as in possession of the powers of the company of 1850. Applications to Parliament were made and were unsuccessful; but the company, notwithstanding this ill-success, assuming parliamentary rights, proceeded with their work, and erected lines of wire and posts in various counties, Buckinghamshire amongst others. Proceedings in Chancery were taken, and the Lords Justices ultimately directed the matter should stand over, in order that the rights of the parties and the rights of the company to do what they were doing, should be ascertained at common law.

Hence this indictment.

Evidence having been given of the existence of the posts, &c., as alleged,

MARTIN, B., at the commencement of the proceedings on the second day of the trial, said he had visited the roads in question, and having regard to the evidence of the witnesses of the previous day, was prepared to say how he should direct the jury as to the law of the case. After some discussion by the counsel on both sides, this course was assented to.

MARTIN, B., to the jury.—There has been a long examination, and a long cross-examination, and the cross-examination was directed to whether the posts were or were not erected upon what was called a formed footpath, which was understood to be the artificial footpath you see upon roads. Now I tell you—

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First.—In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in repair for the more convenient use of carriage or foot passengers.

Secondly.—That a permanent obstruction erected on a highway and placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law, and that if the jury believe that the defendants placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, and dimensions, and solidity as to obstruct and prevent the passage of carriages and horses or foot-passengers upon the part of the highway where they stood, the jury ought to find the defendants guilty upon this indictment, and that the circumstance that the posts were not placed upon the hard or metallic part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict.

Verdict Guilty.

NOTE.—The posts in question were in all cases erected with the assent of the authorities who were the guardians of the highway; and, though some were erected on the highway, the majority were on the side of the highway, and, in some instances, on spots where the soil was so rough as to be practically impassable.

In the ensuing Easter Term, O'Malley, Q.C., moved for a new trial on the ground of misdirection. A full report will be found in page 174.

NORFOLK CIRCUIT.

CAMBRIDGESHIRE LENT ASSIZES.

Cambridge, March 15, 1862.

(Before MR. BARON MARTIN.)

REG v. TURNER. (a)

Bigamy—Absence of Husband for seven years—Direction to jury.

SARAH HANNAH TURNER was indicted for having married at March, in the Isle of Ely, on the 6th of August last, one Frederick Lester, her former husband, James Turner, being at that time alive.

Graham for the prosecution.

Naylor for the prisoner.

Evidence for the prosecution was given proving both the marriages, and that the first husband was now the prosecutor. It was also proved that when before the magistrates the prisoner said "she believed her former husband was dead when she married again."

Naylor, for the prisoner.—I submit this is not a felonious marrying. The woman believed her husband to be dead, and that was the impression in the town where she resided.

MARTIN, B.—The law says seven years shall elapse before it may be presumed that the first husband is dead. In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness. Still the jury are to say if upon such testimony she had an honest belief that her first husband was dead; if they believed she had, then the prisoner would not be guilty of the offence charged in the indictment.

Not Guilty.

(a) Reported by ROBERT OSMUND, Esq., Barrister-at-Law.

CENTRAL CRIMINAL COURT.

April 11, 1862.

(Before the RECORDER OF LONDON.)

REG v. HOTINE.(a)

Registration of birth—False statement to Registrar.

THE defendant was indicted for having wilfully, &c., made certain false statements to the Registrars of Births, concerning the births of certain children, for the purpose of same false statement being inserted in the registers.

Clerk (Beasley with him) for the prosecution.

Giffard (Orridge with him) for the defendant.

The indictment was as follows:—

Central Criminal Court,	}	The jurors for our Lady
to wit.		Queen, upon their oath,

sent, that before and at the time of the committing of the offence hereinafter next mentioned, the district of the Artillery, in county of Middlesex, and within the jurisdiction of the said Court was, and still is, a registrar's district, under and according to provisions of a certain Act of Parliament, made and passed 1836, intituled "An Act for Registering Births, Deaths, and Marriages in England," and hath been during all that time, and still the district of a Registrar of Births and Deaths, within the said district; and the jurors aforesaid, upon their oath aforesaid further present that one Thomas Mason, before, and at the time of the committing the said offence hereinafter next mentioned was the Registrar of Births and Deaths within the aforesaid district, and duly acting in that capacity under and by virtue of according to the provisions of the aforesaid Act of Parliament and the jurors aforesaid, upon their oath aforesaid, do further present that Benjamin Hotine, on the 16th day of July, A.D. 1861 within the jurisdiction of the said Court, did appear before said Thomas Mason, so being such registrar as aforesaid of births and deaths, of and within the said district, the said Thomas Mason then and there having full and competent power and authority

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

births in the district of the Artillery aforesaid, and to statements touching any birth within the said district, and the particulars in and by the said Act of Parliament to be known touching such birth; and that the said Benjamin Hotine then and there unlawfully, knowingly and wilfully make a certain false statement to the said Thomas Mason, and there being such registrar as aforesaid, and then and using such power and authority as aforesaid, that is to say, a statement touching the particulars in and by the said Act of Parliament, required to be known and registered, touching and concerning the birth of a certain child, alleged by him, the said Benjamin Hotine, to have been before then born of the body of Benjamin Robins, for the purpose of the same false statement inserted by the said Thomas Mason, as such registrar as aforesaid, in the register book of births in the said district of the Artillery aforesaid, that is to say, a false statement, that the name of the child, at the time of the making of the statement of him, the said Benjamin Hotine, was Sophia and that the surname of the said mother was then not the maiden surname of Robins, but had become, and was, Benjamin Hotine; whereas, in truth and in fact, and as the said Benjamin Hotine well knew the name of the said mother was Benjamin Hotine at the time of the making of the said statement by him, Benjamin Hotine, nor had, &c.

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were four more counts charging a like offence in regard to children, the births being registered in different districts. An indictment was preferred under the Act 6 & 7 Will. 4, intituled "An Act for Registering Births, Deaths," &c. The Act directs that the Registrar-General shall furnish for the registrars, register books of births. "And every registrar authorised, and is hereby required to inform himself care-fully of every birth, &c., which shall happen within his district, and to sign and register as soon after the event as conveniently may be, without fee or reward, in one of the said books the births so required to be registered according to the forms in the Schedule (A) touching every such birth."

SCHEDULE (A).

Births in the District of Marylebone, North, in the County of Middlesex.

born.	Name if any.	Sex.	Name and surname of father.	Name and maiden surname of mother.	Rank or profession of father.	Signature, description and residence of informant.	When registered.	Signature of registrar.	Baptismal name if added after registration of birth.
Infant	James	Boy	William Green	Rebecca Green, formerly Jennings.	Carpenter	William Green Father Carpenter 17 North-st. Marylebone	9 January	John Cox Registrar	

The words and figures in *italics* in this Schedule to be filled in as the case may be.

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The 20th section directs that the father or mother shall, within forty-two days next after the day of birth, give information being requested so to do, to the said registrar according to the best of his or her knowledge and belief, of the several particulars he is required to be known and registered touching the birth of the child.

The 41st section enacts, that every person who shall wilfully procure or cause to be made, for the purpose of being inserted in the register of birth, death, or marriage, any false statement touching any of the particulars herein required to be known and registered shall be subject to the same pains and penalties as if he were guilty of perjury.

The above Act received the royal assent on the 17th of August 1836, and on the same day the 6 & 7 Will 4, c. 85, intituled "Act for Marriages in England," received the royal assent; section 44 enacts, that this Act shall be taken to be part of the Act for registering births, deaths, and marriages as fully effectually as if incorporated therewith, and that all the provisions and penalties of the said Act, &c.

Sect. 41 enacts, that every prosecution under this Act shall be commenced within the space of three years after the offence committed.

A subsequent Act (1 Vict. c. 22) is an Act to explain and amend the above Acts.

The prosecution was at the instance of the Queen's Advocate and arose out of proceedings in the Divorce Court, where the defendant had presented a petition for a dissolution of marriage on the ground of his wife's adultery.

The Attorney-General having obtained leave to intervene, the defendant withdrew his petition, but in the course of the proceedings made an affidavit, saying:—1st, that in 1838 he was married to one Mary Ann Saunders; 2nd, that there was no issue of the marriage; 3rd, that in Jan. 1839 his wife left him; and 4th, in consequence, in April 1840, he went abroad, and remained until Nov. 1841; 5th, that he discovered his wife was living in adultery with R. H. F; 6th, that since that time to June 1861 (date of filing affidavit) she had lived and was living with the said R. H. F. and had had several children by R. H. F.; 7th, no collusion between himself and wife; and 8th, I have personal cognizance of the several facts which are stated in the 1st, 2nd, 3rd, 4th and 5th paragraphs of this my affidavit, and speak to the same of my own knowledge. I have no personal cognizance of the facts stated in the 6th and 7th paragraphs of this my affidavit; but I depose to the same according to the best of my information and belief.

This affidavit was produced by an officer of the Divorce Court, and evidence having been given by various registrars of the entries in the registers, at the instance of the defendant, in the following:—

SUPERINTENDENT REGISTRAR'S DISTRICT OF WHITECHAPEL.

Births in the District of Artillery, in the County of Middlesex.

Born.	Name if any.	Sex.	Name and surname of father.	Name and maiden surname of mother.	Rank or profession of father.	Signature, description and residence of informant.	When registered.	Signature of Registrar.	Baptismal name if added after registration of birth.
South lane 44 Chapel street Church fields	Benjamin James	Boy	Benjamin Hotine	Sophia Hotine formerly Robins	Fish- monger	Benjamin Hotine Father No 4 Chapel street	16th of July 1844	Thomas Mason Registrar	

is a true copy of an entry in the certified copies of entry in the register book of births in the District of Artillery, in the County of Middlesex. Given at the General Register Office, under the seal of the office 7th day of March, 1862.

proposed the affidavit should be read, relying upon that that the defendant was, in 1838, married to Mary Ann, that at the time he caused the entries to be made in to the births of the children since she left him, and when bed Sophia Hotine, formerly Robins, as the mother, he wife Mary Ann Hotine, formerly Saunders, was alive.

use for the prosecution being closed,

d objected that the 6 & 7 Will. 4, c. 85, s. 41, enacts y prosecution under the Act shall be commenced within us, and a provision is also made incorporating the Act 6 & 7 Will. 4, c. 86; so this prosecution is out of time. r. *Lord Dunboyne*, 3 Car. & Kir. this point was urged, l Campbell, who was trying the case, thought it so argue- he said he would reserve it if it became necessary.

RECORDER.—Of course that will be so in this case.

d then objected that the affidavit did not sufficiently prove wife Mary Ann Saunders was alive at the time the n the registers were made. "The defendant expressly s to the 5th and 6th paragraphs, he is only stating to of his knowledge and belief. He may be lawfully to Sophia Robins, and his description then would be true. He swears he has not seen or cohabited with his s 1839."

—It is not for the prosecution to show that he has not d bigamy.

RECORDER.—You say he has either committed bigamy or d statement. It is not enough for you to say he has d one of two crimes, and ask the jury to say he has come one you select. It is for you to prove he knew his wife at the time he caused these entries to be made, not that it when the affidavit was sworn in 1861.

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Giffard.—I say, further, that the statements made to the registrars are true, and that if what the prosecution are contending for be correct, illegitimate children could never be registered. It is not required by the Act 6 & 7 Will. 4, c. 86, that a man should state to the registrar whether or not he is married to the woman with whom he is living. There is nothing in the schedule to show that the words father, mother, mean married father or married mother. A bastard is sometimes called *filius nullius*, but as an example that the defendant rightly described himself as father, in *Rex v. Hodnett*, 1 T. R. 9, it was held that bastards are within the meaning of the Marriage Act, which requires the consent of the father, &c., to the marriage of persons under age who are not married by banns. The words in the schedule, maiden surname of mother are relied upon as applying only to a change of surname by marriage, but a surname is gained by reputation. What law is its existence gives a surname? How does a woman change her name by marriage?

The RECORDER.—Her first act after marriage is to sign, not the name it is said she acquires, but her maiden name.

Giffard.—And she gains the surname of the husband by reputation and so a "bastard may gain a surname by reputation, though he has none by inheritance;" (1 Inst. 3, 123; 6 Co. 65.) Although the legislature, in passing this Act, had the old registers before them, they made no distinction as to how a bastard should be described in the register. It was the custom in the old parish registers to add to the entry B. B., signifying base born. The Act under which this prosecution is instituted says, "It is expedient to provide the means for a complete register of the births, &c., of his Majesty's subjects in England;" and there is nothing in it to show that it is intended to be used as a means for discovering persons living together are married or not. Had that been an object the words legal father or legal mother might have been used in the schedule.

Orridge, on same side.—The 18th sec. of 6 & 7 Will. 4, c. 86 defines the duty of the registrar upon a birth being registered. "Every registrar shall be authorised, and is hereby required to inform himself carefully of every birth, &c., which shall happen within his district, &c., and to learn and register as soon after the event as conveniently may be done, &c., in one of the said books, the particulars required to be registered according to the forms in the said schedules A and B respectively touching every such birth, &c." And the 20th sec. of the same Act directs that the father, &c., "shall, within forty-two days next after the day of every such birth, give information upon being requested so to do to the said registrar, according to the best of his knowledge and belief, of the several particulars hereby required to be known and registered touching the birth of such child." Here, to the best of the defendant's belief, he was the father of the child, and any conversation the registrar may have had with him as to married or

not married was extra his duty. The schedule is explicit, and the sections just quoted refer to it.

John Clerk (*Beasley* with him).—The question of course is, whether the defendant knowingly gave untrue information to a registrar bound by the Act 6 & 7 Will. 4, c. 86, to ascertain certain particulars and insert them in a book also directed to be kept by the registrar. If the schedule to that Act simply said "father and mother," much of the argument advanced might avail; but the words are "name and maiden surname of mother," and surely that must be taken to mean surname, before being changed by marriage. Although the first act of a wife after marriage is to sign her maiden name, she is at once addressed by surrounding friends by the new name she has acquired, and that name is hers till changed by permission of the law, or, perhaps, another marriage. If the Act intended by "maiden surname" the name of the mother *before marriage*, the registrar was bound to ascertain if the defendant were married, and the defendant by saying the name was "Hotine, formerly Robins," answered falsely, &c.

The RECORDER.—Suppose, fifteen years back, there was a Sophia Robins, and during the last fifteen years she was known as Sophia Hotine, what would be her real name?

Clerk.—To the world, Hotine; and if the defendant had been simply asked the name of the mother, "Hotine" would, perhaps, have been correct; but he goes farther, and says her "maiden surname" has been changed.

Giffard.—If a person marry a widow, it could hardly be contended that in order to comply with the form of the Act her maiden name was to be given. That would not identify her.

The RECORDER, after consulting *Mellor, J.*, said, as to the points whether in law these were true answers to the questions required to be answered by the Act of Parliament, is a question I shall, if it becomes necessary, reserve for the consideration of the Court of Crown Cases Reserved; but I shall take the opinion of the jury whether there was, on the part of the defendant, a wilful misdescription made, with the object that a falsehood should be inserted in the register.

Not Guilty.

REG.
v.
HOTINE.
—
1862.

Registration
of birth—False
statement.

COURT OF CRIMINAL APPEAL.

April 26, 1862.(Before ERLE, C.J., MARTIN, B., CHANNELL, B., BLACKBURN J.,
and KEATING, J.)

REG. v. FRANCIS FRETWELL. (a)

Abortion—Attempt to procure—Supplying drug—Accessory.

The deceased woman became pregnant by the prisoner, and died from the effects of corrosive sublimate taken by her for the purpose of producing abortion. The prisoner knowingly procured it for the deceased at her instigation and under the influence of threats of self-destruction if the means of producing abortion were not supplied to her. The jury negatived the fact of the prisoner having administered it, or caused it to be taken by her :

Held, that the prisoner was not guilty of murder as an accessory before the fact.

CASE reserved for the opinion of this Court by Cockburn, C. Francis Fretwell was indicted and tried before me, at the last assizes for the county of Nottingham, for the wilful murder of Elizabeth Bradley. The deceased had died from the effects of corrosive sublimate taken for the purpose of producing abortion.

The poison had been procured for her by the prisoner with full knowledge of the purpose to which it was to be applied; but there was ground for believing that the prisoner in procuring the poison had acted at the instigation of the deceased, and under the influence of threats by her of self-destruction if the means of producing abortion were not supplied to her.

She was a married woman living in service separately from her husband, and had become pregnant by the prisoner. She had endeavoured to purchase corrosive sublimate herself, but the druggists to whom she had applied having refused to furnish it to her, she had urged the prisoner to procure it. The prisoner was not present when the poison was taken.

The facts in question occurred in the month of July 1861, anterior to the coming into operation of the 24 & 25 Vict. c. 94.

The Jury, upon questions specially put to them by me upon the evidence, expressly negatived the fact of the prisoner having administered the poison to the deceased, or caused it to be taken

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

by her. They found specially that the prisoner procured the poison, and delivered it to the deceased with a knowledge of the purpose to which she intended to apply it, and that he was therefore accessory before the fact to her taking poison for the purpose of procuring abortion.

Upon this finding I directed the jury to find a verdict of wilful murder against the prisoner, reserving for the consideration and decision of the Court of Criminal Appeal whether such verdict was right in point of law.

In giving such direction I acted in deference to the authority of the case of *Reg. v. Russell*, 1 Moo. C. C. 356, but it appearing to me doubtful how far the ruling of the judges in that case, that if poison be taken by a woman to produce abortion, and death ensues, the woman is *felo de se*, could be upheld; and still more so how far a man, accessory to the misdemeanor of a woman in taking poison for the purpose of producing abortion, can properly be held to be accessory to the self-murder of the woman, if contrary to the intention of the parties death should be the consequence; I have reserved these points for the consideration of the Court.

A further question arises as to the admissibility of the depositions of the deceased, upon which the case against the prisoner mainly depended.

Her evidence having been taken on a charge against the prisoner of having administered, or caused to be taken, poison, in order to produce abortion, it was objected that the depositions were not admissible on the present charge as being substantially different from the one on which the evidence had been taken.

I was disposed to think, the transaction being the same, the evidence was admissible, although, in consequence of the death of the woman having supervened, the charge had assumed a different shape and character. I however reserved this question also for the consideration of the Court.

A. E. COCKBURN.

No counsel appeared to argue on either side in this case.

The following is an abstract of the case of *Rex v. Russell*, cited above:—"Russell was tried on an indictment which charged Sarah Wormsley with murdering herself with arsenic, and Russell with inciting her to commit the said murder. It appeared that Wormsley, who was about four months advanced in pregnancy, but not quick with child, died from taking arsenic, which she had received from Russell, for the purpose of procuring a miscarriage, and that she knowingly took it with intent to procure a miscarriage, in the absence of Russell. It was objected that there was no evidence to prove that she was *felo de se*; that the 9 Geo. 4, c. 31, s. 13, did not apply to a woman administering poison to herself; and that, assuming her to have taken arsenic knowingly, and with intent to procure a miscarriage, she was not guilty of any offence; and, consequently, if there were no principal there could be no accessory. Secondly, that the 7 Geo. 4, c. 64, s. 9, did not apply to the case of a principal who was *felo de se*. Upon a case reserved, it was held that she was *felo de se*; that Russell was an

REG.
v.
FRANCIS FRANK-
WELL.
1869.
Felo de se—
Accessory.

REG.
v.
FRANCIS FRET-
WELL.
—
1862.
—
Felo de se—
Accessory.

accessory before the fact, but that he could not be tried as an accessory under the 7 Geo. 4, c. 64, s. 9, as he could not have been tried at all before that statute, which was to be considered as extending to those persons only who before the statute were triable either with or after the principal, and not to make those triable who before never could have been tried."

ERLE, C.J.—The prisoner was convicted of murder, and the question is, whether, upon the facts, he was properly convicted. The deceased, Elizabeth Bradley, was pregnant, and took a dose of sublimate for the purpose of producing abortion. The sublimate had been procured for her by the prisoner, with the full knowledge of the purpose for which it was to be applied. The prisoner in procuring the poison had acted at the instigation of the deceased and under the influence of threats of self-destruction if the means to procure abortion were not supplied to her. Then the case sets out the motives which induced the woman to be so desirous of preventing her state being known. The jury negatived the fact of the prisoner having administered the poison to the deceased, or caused it to be taken by her; but said that he had delivered it to her with the knowledge of the purpose to which she intended to apply it, and so they were directed that he was a principal in the murder. Cockburn, C.J., reserved the case, holding the party to be guilty of murder by reason of the decision in the case of *Reg. v. Russell*, 1 Moo. C. C. 356; but the facts of the present case appear to me to differ materially from the facts in that case, where the prisoner, finding the woman to be pregnant, procured arsenic for the purpose of procuring abortion, and himself administered arsenic to her, she taking it without a knowledge of what it was but taking it for the purpose of procuring abortion, and it caused her death. The Judges held that it was a dangerous misdemeanor in her to take a drug for the purpose of procuring abortion, but a statute had recently passed to meet such a case. It had been held to be a dangerous misdemeanor to take a drug, and if in the perpetration of a dangerous misdemeanor death ensued, the party was guilty of murder for that death, and the woman had been held by a majority of the judges to have been guilty of murder, *felo de se* and Russell was an accessory to the murder by administering the arsenic with intent to procure abortion. Now, in the present case there appears to me a very marked distinction between the conduct of the prisoner Fretwell and the conduct of the prisoner Russell. In Russell's case the prisoner administered the poison. In the present case the prisoner was unwilling that the deceased should take the poison; it was at her instigation and under the threat of self-destruction that he procured it and supplied it to her; but it was found that he did not administer it to her or cause her to take it. It would be consistent with the facts of the case that he hoped she would change her mind; and it might well be that the prisoner hoped and expected that she would not resort to it. There is a material distinction between the two cases. The Court do not think it necessary to lay down the law whether the person taking

it would be guilty of *felo de se*. I am the more fortified in this decision by looking at the late statute, 24 & 25 Vict. c. 100, ss. 58, 59, which contains some important provisions, and has defined the crime both of the woman taking the poison and the party procuring it and causing her to take it. The late statute has made the party who procures the drug guilty of a misdemeanor, but made it a totally different kind of crime to the administering. In my opinion the prisoner was not guilty of murder, and the conviction must be reversed.

MARTIN, B., thought the conduct of the prisoner was too remote to make him guilty of murder.

CHANNELL, B., concurred in the judgment as given by Erle, C. J.

BLACKBURN, J., also concurred. According to the finding of the jury the prisoner did not cause the poison to be administered, and was not a party to it in such a way as to make it amount to murder.

KEATING, J., was of the same opinion.

Conviction reversed.

REG.
v.
FRANCIS FRET-
WELL.
—
1862.
—
*Felo de se-
Accessory.*

COURT OF CRIMINAL APPEAL.

April 26, 1862.(Before ERLE, C.J., MARTIN, B., CHANNELL, B., BLACKBURN, J.,
and KEATING, J.)

REG. v. WILLIAM STEPHENSON.(a)

*Evidence—Illness of witness—Admissibility of deposition—11 & 12 Vict.
c. 42, s. 17.*

It is a question for the presiding judge to determine whether the proof of a witness being so ill as not to be able to travel, within the meaning of the 11 & 12 Vict. c. 42, s. 17, is sufficient for the purpose of admitting his deposition before the committing magistrate. Therefore, when the deposition was admitted upon evidence that the prosecutrix was daily expecting her confinement and otherwise poorly, and therefore too ill to travel, this court declined to interfere with the exercise of the discretion of the presiding judge.

CASE reserved for the opinion of this Court by the Chairman of the North Riding Sessions (Yorkshire).

The prisoner was tried at the Easter quarter sessions of the North Riding of Yorkshire for obtaining money under false pretences from one Mary Smith.

The female servant and the brother of Mary Smith proved that the latter was daily expecting her confinement; and the brother stated that she was "poorly otherwise;" and that she was therefore too ill to travel from her place of residence to the place of trial, a distance of about twenty-five miles.

The counsel for the prosecution then proposed to give in evidence the deposition of Mary Smith, duly taken before the committing magistrate, to which the prisoner's counsel objected, on the ground that the illness (if any) ought to have been proved by a medical man, and that the expectation of her confinement was not an illness contemplated by sect. 17 of the 11 & 12 Vict. c. 42, which authorised the deposition being given in evidence on the trial.

The Court decided on receiving the evidence tendered by the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

prosecution of the illness, and also upon reading in evidence the deposition of Mary Smith, taken before the committing magistrate.

The prisoner was found guilty, and sentenced to two calendar months' imprisonment, with hard labour; but the execution of the sentence was respited, and the prisoner was admitted to bail to appear at the next quarter sessions of the North Riding of Yorkshire.

At the request of the prisoner's counsel, this case was granted for the opinion of the Court of Criminal Appeal on the points raised on behalf of the prisoner.

CATHCART, Chairman.

No counsel appeared to argue on either side.

The following are the words of sect. 17 of the 11 & 12 Vict. c. 42:—"And be it enacted that in all cases where any person shall appear, or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do, and if, upon the trial of the person so accused as first aforesaid it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, *or so ill as not to be able to travel*, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

ERLE, C. J.—The question reserved in this case is, whether the deposition of the prosecutrix, taken before the committing magistrate, was admissible in evidence at the trial in consequence of proof of her illness at the time, and whether her illness was within the meaning of the statute. The words of the statute are, "If the party shall be proved to be dead or too ill to travel."

Rex.
v.
Stratton.
1862.
Depositions—
Admissibility.

REG.
v.
STEPHENSON.
—
1862.
—
Deposition—
Admissibility.

The evidence at the trial was, that the prosecutrix was daily expecting her confinement, and her brother stated that "she was poorly otherwise," and that she was therefore too ill to travel. The prisoner's counsel objected that the illness ought to have been proved by a medical man, and that the expectation of her confinement was not an illness within the meaning of the statute to admit the deposition. We do not mean to affirm such a proposition. There may be incidents in regard to pregnancy which will bring the case within the statute, and we consider that it is in the discretion of the presiding judge to determine whether the deposition is admissible under the circumstances, for he is responsible that the party be proved to be too ill to travel, and this Court ought not to reverse his decision. We therefore think the Court of Quarter Sessions acted rightly in admitting the deposition, and affirm the conviction.

The other Judges concurred, on the ground that it was a question for the presiding judge to determine, and that if he thought the evidence of the illness sufficient within the statute, it was for him to act upon his discretion.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 26, 1862.

(Before ERLE, C.J., MARTIN, B., and CHANNELL, B.,
BLACKBURN, J., and KEATING, J.)

REG. v. JOHN JENNISON.(a)

False pretence—Existing fact—Promise.

Money was obtained by the prisoner from an unmarried woman on the false representations that he was a single man, and that he would furnish a house with the money, and would then marry her :

Held, that the false representation of an existing fact (that he was not a single man) was sufficient to support a conviction for false pretences, although the money was obtained by that representation, united with the promise to furnish a house and then marry her.

CASE reserved for the opinion of this Court by Cockburn, C.J. John Jennison was indicted and tried before me at the last assizes for the county of Nottingham for obtaining 8*l*. from one Ann Hayes by false pretences.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The prisoner, who had a wife living, had represented himself to the prosecutrix, who was a single woman in service, as an unmarried man, and pretending that he was about to marry her, induced her to hand over to him a sum of 8*l*. out of her wages received on leaving her service, representing that he would go to Liverpool, and with the money furnish a house for them to live in, and that having done so he would return and marry her. Having obtained the money the prisoner went away and never returned.

The prosecutrix stated that she had been induced to part with her money on the faith of the representation of the prisoner that he was a single man, that he would furnish a house with the money, and would then marry her.

There was no doubt that these representations were false, and that morally the money had been obtained by false pretences. But it was contended on the part of the prisoner that, as the prosecutrix had been induced to part with the money by the joint operation of the three representations made by the prisoner, that he was unmarried, that he would furnish a house with the money, and that he would then marry her, and as only the first of these pretences had reference to a present existing fact, while the others related to things to be done in future, the indictment could not be maintained.

I reserved the point, and the prisoner having been convicted, have now to request the decision of the Court upon the question.

A. E. COCKBURN.

No counsel appeared to argue on either side.

ERLE, C.J.—We are of opinion that the conviction in this case was proper. The indictment was for obtaining 8*l*. from Ann Hayes by false pretences, and it was found by the jury that the woman parted with the money on the false representation by the prisoner that he was a single man, and the promise that he would lay out the money in furnishing a house for them to live in, and that he would then marry her. It is perfectly clear, that obtaining money by a false promise is not the subject of an indictment; but here there was the false pretence that the prisoner was an unmarried man, which was an essential fact in this case, and without which pretence the prisoner never would have obtained the money from the woman. Now, one false fact, by means of which the money is obtained, sufficiently sustains the indictment, although it may be united with false promises which would not of themselves do so. The conviction therefore was right.

The other Judges concurring,

Conviction affirmed.

REG.
v.
JENNISON.
1862.
False
pretences—
Existing fact.

COURT OF CRIMINAL APPEAL.

April 26, 1862.

(Before ERLE, C.J., MARTIN, B., CHANNELL, B., BLACKBURN, J.,
and KEATING, J.)

REG. v. JAMES FITCH.

REG. v. JOHN HOWLEY.(a)

*Forgery—Turnpike ticket—Receipt for money—24 & 25 Vict.
c. 98, s. 23.*

*A turnpike ticket is a receipt for money, and the forging, &c., thereof is
a felony within the meaning of the 24 & 25 Vict. c. 98, s. 23.*

CASE reserved for the opinion of this Court by Wightman, J.:—
At the last Kingston Assizes, two men, named James Fitch
and John Howley, were severally convicted before me of uttering
forged receipts for money, and the question is, whether the
document which in each case was uttered by the prisoners
respectively is a receipt for money within the meaning of the
24 & 25 Vict. c. 98, s. 23.

The prisoners were two of the carmen employed by the South
Western Railway Company, who every evening repay the
carmen any sums they may have expended during the day for
passing with their vans or carts through any turnpikes, and each
of the prisoners produced and gave to the officer of the company
whose duty it was to pay them or allow them in account any
money they had expended in passing through the St. James
turnpike-gate, a false ticket, in form and colour resembling those
issued at that gate, as a voucher for their having passed through
the gate and paid the tolls, whereas they had not passed through
that or any of the gates belonging to the trust, or paid the tolls.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The document, in form, is as follows :—

<p>“ Bermondsey, Rotherhithe 19/2 and Deptford Roads, 1/- St. James's-gate. 18 Clears Fort-place, East-lane, Plough-bridge, St. James's China-hall, Rotherhithe, New- road, Gibraltar Swan-bar, and on all side bars of the trust.”</p>

Rec.
v.
Howley.
1862.

Forgery—
Receipt for
money.

and is in imitation of a turnpike-ticket given upon passing through the St. James's-gate. The figure 1s. upon the right-hand side indicates that 1s. has been paid upon passing through the turnpike-gate. If a larger or smaller sum than 1s. is paid, the sum actually paid is inserted, and the 1s. marked upon the copy set out in this case is merely introduced as a specimen of the form.

The prisoners are now undergoing the sentence which I passed at the time. WM. WIGHTMAN.

C. Wood was instructed on behalf of the prosecution; no counsel was instructed for the prisoners.

MARTIN, B., asked what the objection raised at the trial was.

J. Thompson (*amicus curiæ*) said, he, as counsel in the case at the trial, had taken the objection that a turnpike-ticket was a mere pass entitling a person to pass with his horse and vehicle through the gates mentioned on it, and that it was not a receipt for money; but on looking into the General Turnpike Act, 3 Geo. 4, c. 126, s. 37 (see also 4 Geo. 4, c. 95, s. 28), he found that the objection was not tenable, for turnpike trustees were bound to provide tickets denoting the payment of toll, and also specifying the gates freed by such payment and entitling the person producing the same to pass through the gates mentioned without paying any further toll.

By the COURT,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 3, 1862.

Before ERLE, C.J., MARTIN and CHANNELL, BB., and
BLACKBURN and KEATING JJ.

REG. v. CHARLES SMITH.(a)

*Forgery—Friendly society—Member—Banker's pass-book—Entry
receipt of money.*

The prisoner was the treasurer, and also a member of an unfriendly society, and it was his duty to pay moneys received in the society's bankers. The prisoner produced to the society a false book, purporting to be the bank pass-book, containing entries purporting to vouch that he had paid certain moneys into the bank, and that they acknowledged the receipt of them, which book did not truly represent the state of account. The prisoner having at various times drawn moneys which he had appropriated for his own purpose, the jury found the prisoner guilty of presenting a false account with intent to credit for having paid the moneys into the bank with a view to other moneys from the society which he might fraudulently appropriate to his own use:

Held, that the prisoner, though a member of the society, might properly be convicted of uttering a forged receipt with intent, &c.

CASE reserved for the opinion of this Court by Mellor, J.
The prisoner was tried before me at the York Assizes for forgery of a banker's pass-book.

The indictment contained twelve counts. The abstract is annexed.

The prisoner was the treasurer of a friendly society, the Society of the Golden Fleece. It was not enrolled as a mere voluntary society. The society met on the first Saturday evening in every month. It was the prisoner's duty to receive the contributions of the members of the society, and to add money to the relieving officers for the sick members, and in the meantime into the West Riding Union Bank the money which he had received at the meeting of the society in his name for the benefit of the society.

Accordingly on the first Saturday in November 1857, he received at a meeting of the society 20*l.* to pay into the bank, and on the first Saturday in December following, the prisoner being present at a meeting of the society, said that he had received 20*l.* in, and produced a book purporting to be a banker's pass-book in order to vouch to the society that the sum of 20*l.* had

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

paid to the said West Riding Union Bank, and the book so produced was looked at and examined by the members of the society then present.

At subsequent meetings of the society the several sums of 40*l.*, 15*l.*, 40*l.* and 30*l.* were paid to him for the like purpose, and the said book, purporting to be the banker's pass-book, was produced by the prisoner, and shown to the members of the society at meetings of the society, to vouch the payments of the said several sums into the bank.

The prisoner continued to be the treasurer of the society until the last day of August 1861, and at that time the said book, purporting to be the said pass-book, represented the account at the banker's as follows:—

**Mr. Charles Smith, Shepley, in account with the West Riding Union
Banking Company.**

Dr.		Cr.	
1859, Feb. 22	£ s. d.	1857.	£ s. d.
Interest up to that		Nov. 18, Cash.....	20 0 0
time	2 15 0	1858.	
		Feb. 19, Cash	40 0 0
		Aug. 24, Cash	15 0 0
		Dec. 22, Cash	40 0 0
		1859.	
		Feb. 22, Cash	30 0 0

Upon a new treasurer being elected, an investigation took place, and it then appeared that the book which the prisoner had from time to time produced as the pass-book of the said banking company for the purpose of vouching the payments of the said several sums into the bank was fictitious, and did not truly represent the state of the account, but had been written by the prisoner's desire by a person named David Smith, who was his cousin, whereas the genuine pass-book kept between the prisoner and the banking company stated the account as follows:—

**Mr. Charles Smith, Shepley, in account with the West Riding Union
Banking Company.**

Dr.				Cr.			
1859.				1857.			
	£	s.	d.		£	s.	d.
May 31, Cash	20	0	0	Nov. 18, Cash.....	20	0	0
June 30, Balance ...	61	7	4	Dec. 31, Interest.....	0	2	1
					<hr/>		
					20	2	1
				1858.			
				June 30, Interest	0	5	6
					<hr/>		
					20	7	7
				Dec. 23, Cash	40	0	0
				Dec. 31, Interest	0	5	6
					<hr/>		
					60	13	1
				1859.			
				Feb. 22, Cash	20	0	0
				June 30, Interest.....	0	14	3
					<hr/>		
					£61	7	4

£81 7 4

M 2

£81 7 4

Рис.
7.
Сметн.

1862.

**Forgery—
Banker's
pass-book.**

REG.
v.
SMITH.
1862.
Forgery—
Banker's
pass-book.

It further appeared that the above account truly represented all the sums which the prisoner had paid into the said bank, but that the actual balance in the bank when the new treasurer was elected was 3*l.* 1*s.* 11*d.* and no more, the account having been reduced to that sum by the prisoner drawing out at various times sums of money which he had appropriated for his own purposes.

It was objected on the part of the prisoner that this was a mere voluntary association, that the prisoner was interested in the moneys, and that inasmuch as the book which he presented stated the sums which he had received, the mere misrepresentation of the true state of the account between him and the bank was no offence.

I declined to stop the case, but told the jury that if they were of opinion that the prisoner presented a false account to the members at the meeting of the society with intent thereby to obtain credit for having duly paid into the bank the various sums which he had received and to be continued in his office of treasurer, with a view to obtain other moneys from the society which he might fraudulently appropriate to his own use, to find him guilty.

The jury found him guilty, and I postponed the judgment, and discharged the prisoner upon recognizance to appear when called upon.

I request the opinion of the Court of Criminal Appeal whether the prisoner was rightly convicted.

JOHN MELLOR.

INDICTMENT.

First count.—That Charles Smith, on the 5th March, 1859 did forge and counterfeit a certain writing in the words and figures following:—

Mr. Charles Smith, Shepley, in account with the West Riding Union Banking Company.

Dr.				Cr.
1859.	£	s.	d.	1857.
Feb. 22, Interest up				Nov. 18, Cash.....
to that time	2	15	0	1858.
				Feb. 19, Cash
				Aug. 24, Cash.....
				Dec. 22, Cash
				1859.
				Feb. 22, Cash

with intent to defraud.

Second count.—With uttering the said forged writing with intent to defraud.

Third count.—Did forge a certain writing purporting to be the pass-book between the West Riding Union Banking Company and the said Charles Smith, with intent to defraud.

Fourth count.—Did utter a forged pass-book, with intent to defraud.

count.—Did forge a certain other writing, purporting to pass-book between the West Riding Union Banking Com-
t Huddersfield, and the said Charles Smith, with intent to

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count.—Did utter a forged pass-book between the West
Union Banking Company, at Huddersfield, and the said
Smith, with intent to defraud.

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nth count.—Did forge a certain other writing, purporting
bank pass-book, with intent to defraud.

th count.—Did utter a forged pass-book, with intent, &c.

h count.—Did, on the 4th September, 1858, utter a forged
ok, with intent, &c.

h count.—Did, on the 1st January, 1859, utter a forged
ass-book, with intent, &c.

enth count.—Did, on the 5th March, 1859, utter a certain
bank pass-book, with intent, &c.

lfth count.—Did, on the said 5th March, 1859, utter a
receipt for money, with intent to defraud, against the
and against the peace.

counsel appeared to argue on either side.

E, C.J.—In this case the prisoner was indicted for forging and
g a certain writing, purporting to be a bank pass-book, with
to defraud. There were various counts in the indictment; and
action is, whether that is the subject of forgery. The case
v. *Harrison* (1 Leach C. C. 180), is in point. In that case
dges were of opinion that an entry in a banker's pass-book
accountable receipt, within the 7 Geo. 2, c. 22. The con-
will therefore be affirmed.

rest of the COURT concurring,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 3, 1862.

(Before ERLE, C.J., MARTIN and CHANNELL, BB., and
BLACKBURN and KEATING, JJ.)

REG. v. WILLIAM MOODY.(a)

Forgery—Savings bank book—Entries.

The prisoner was the paid secretary of an unenrolled friendly society, of which his wife was a member. The prisoner delivered to the society a book on which was indorsed "Savings Bank, New-street, Huddersfield," and in which was an entry, "1855, Oct. 30, received 40l." It was proved that the entry was a forgery, and that the money had not been paid into the savings bank. The jury having found that the prisoner was guilty of knowingly uttering with intent to deceive the society, and that he had, in fact, defrauded it, it was objected for the prisoner that being the husband of a member, he was a part owner, and could not be made criminally liable for defrauding his co-owners, and also, that the document was not the subject of forgery: Held, that both objections were untenable, and that the conviction was right.

CASE reserved for the opinion of this Court at the Yorkshire Spring Assizes, 1862:—

The prisoner was tried at the last assizes for the county of York, before me, one of the Counsel named in the commission.

The first count of the indictment charged that the prisoner feloniously forged a certain writing, in the words and figures following:—

"Savings Bank,
"New-street, Huddersfield.

"1855, October 30, received 40l."
with intent to defraud, against the form of the statute.

The second count charged the prisoner with uttering the said writing knowing it to be forged, against the form of the statute.

The third count charged the prisoner with forging an accountable receipt for money, against the form of the statute.

The fourth count charged the prisoner with uttering a forged writing, purporting to be an accountable receipt for money, knowing it to be forged, against the form of the statute.

The fifth count charged the prisoner with forging an acquittance and receipt for money, against the form of the statute.

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

The sixth count charged the prisoner with uttering, knowing it to be forged, a certain forged writing, purporting to be an acquittance and receipt for money, against the form of the statute and against the peace, &c.

The counsel for the prosecution in stating the case abandoned the counts for forgery.

Evidence was given that there was, before the month of October 1855, and still is, at Kirkeaton, in Yorkshire, a society, supported by monthly payments, for the relief of sick, and burial of deceased members, called the Society of Ancient Shepherdesses.

Of this society the wife of the prisoner was, before the month of October 1855, and until recently continued to be, a member.

The prisoner was, in September 1855, and from that time until November 1861, the paid secretary of the society.

At a meeting of the society held in the month of October 1855, he was directed by the society to pay into the Huddersfield Savings Bank, for the society, a sum of 40*l.*, which was at the time given him for that purpose.

At the then next meeting of the society, which was held either one or two months after the meeting in October 1855, and at which from twenty to thirty members of the society were present, the prisoner delivered to the society a book, on which was indorsed the words "Savings Bank, New-street, Huddersfield;" and on the first page of which was written, "1855, October 30, received 40*l.*"

When the prisoner delivered the book he said, "That is the book belonging the money."

The book was put into the society's box, and not taken out again until October 1861.

The actuary of the Huddersfield Savings Bank proved that neither the indorsement nor the entry was in the handwriting of himself, or of any person employed at the bank. It was also proved that if the money had been paid into the bank on the 30th October, 1855, and had remained in it until the 30th October, 1861, interest would have been allowed thereon, amounting to more than 12*l.* 10*s.*

Prisoner continued to receive his salary from the society until 25th November, 1861, but did not, after receiving the 40*l.*, receive any other money belonging to the society.

The fact that the 40*l.* had not been paid into the savings bank was not discovered until November 1861.

The prisoner did not at any time pay any money into the savings bank to the credit of the society, but on the 6th October, 1860, he paid 10*l.* into the savings bank to his own credit.

The counsel for the prisoner did not deny that the indorsement and entry were forged, but he objected:—1st. That the prisoner, being at the time when he uttered the forged writing, the husband of one of the members of the society, was part owner of the money obtained, and could not be made criminally liable for any defrauding of his co-owners, the society not being enrolled under

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the provisions of any Act of Parliament. 2nd. That the prisoner having received the 40*l.* before he uttered the forged writing, there was no evidence of any uttering with intent to defraud. 3rd. That the writing was not a document, the uttering of which, assuming it to have been forged, and assuming that the prisoner at the time he uttered it knew that it was forged, would support any of the counts of the indictment.

I overruled all the objections, subject to the opinion of the Judges on a case.

I asked the Jury:—

1. Whether the prisoner uttered the writing upon and in the book, knowing it be forged, in order to induce the members of the society to believe that he had paid the money into the bank? If so,

2. Did he do this for the purpose of being continued in his office of secretary, and thereby obtaining further moneys? and

3. Was the society in fact defrauded by his uttering the forged writing?

The Jury answered all the questions in the affirmative, and found the prisoner guilty on the counts for uttering, and not guilty on the counts for forging.

I postponed the judgment.

The question on which I beg the opinion of the Judges is:—

Ought the prisoner to have been acquitted on the objections taken by his counsel, or any of them? If he ought, then the verdict of guilty is to be set aside, and a verdict of not guilty on the whole indictment entered, otherwise the verdict is to stand.

J. MONK,

No counsel appeared to argue on either side.

ERLE, C. J.—This is substantially the same point as in the case of *Reg. v. Charles Smith* (see *supra*), and we give the same judgment. The circumstances are very analogous in this case, which was reserved by Mr. Monk. Another objection was taken, which we think untenable, viz., that the prisoner was jointly interested with the other members in the funds of the society. In this case it was a forgery that would defraud the whole of the members of the company. This conviction will, therefore be affirmed.

MARTIN, B.—I am of the same opinion. The forgery in this case would also defraud the banker, who would be rendered liable for acting upon it. The very meaning of an entry of the receipt of money in the banker's pass-book is, that the banker has received the money so entered, and binds himself thereby to be accountable to the depositor for it. Why is not that an accountable receipt? The conviction must be affirmed.

The rest of the COURT concurring,

Conviction affirmed.

COURT OF QUEEN'S BENCH.

February 14, 1862.

(Before WIGHTMAN and CROMPTON, JJ.)

PARKER v. GREEN.(a)

*Public-house—Permitting persons of bad character to assemble therein—
Licence—Witness—9 Geo. 4, c. 61—14 & 15 Vict. c. 99.**Twenty-four prostitutes and fifty men remained at the bar of a public-house for an hour or more. The women were disorderly, and some of them swearing. At a later hour the same evening fifty prostitutes and sixty men were there, some of the prostitutes being the same as were there at the earlier part of the evening. Several of the same prostitutes were proved to have been in the same house on other evenings. The defendant was present on these occasions:**Held, that this was sufficient evidence of knowingly permitting and suffering persons of notoriously bad character to assemble and meet together in the house, contrary to the Excise licence granted under 9 Geo. 4, c. 61:**Held, also, that an information for such offence was a criminal proceeding, and that the defendant was not admissible as a witness upon the hearing of it.***C**ASE stated under the 20 & 21 Vict. c. 43.

At a petty sessions, holden at the Guildhall, Plymouth, on the 16th May, 1861, an information preferred by Thomas Green, an inspector of police for the said borough (the respondent) against John Parker (the appellant), under the 21st section of 9 Geo. 4, c. 61, charging that the said John Parker, on the 13th May, 1861, at the borough aforesaid, being a person duly licensed to sell excisable liquors by retail, in his house and premises there situate, did unlawfully and knowingly permit and suffer divers persons of notoriously bad character to meet and assemble together in his said house and premises, against the tenor of his licence and contrary to the form of the statute, came on for hearing before us, the undersigned, being two justices, &c., and upon such hearing the appellant was duly convicted, and we adjudged him guilty as of a first offence against the provisions of the said Act, 9 Geo. 4, c. 61, relative to the maintenance of good order and rule, and to forfeit and pay the sum of 5*l.* and 16*s.* for costs, and in default of payment and sufficient distress we adjudged the said appellant to be

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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imprisoned in the gaol of Plymouth aforesaid for one calendar month, unless the said several sums, and all costs and charges the said distress, should be sooner paid. And the appellant being dissatisfied, &c., we do hereby sign and state the following

CASE.

At the general annual licensing meeting for the said borough of Plymouth, held on the 15th September, 1860, a licence was granted to the appellant to authorise and empower him to keep an inn, alehouse, or victualling-house at the sign of the Queen's Hotel, situate in George-street, in the said borough of Plymouth which is one of the most public thoroughfares in the said borough and by the said licence (which is in the form prescribed by the said Act 9 Geo. 4, c. 61) it is provided, amongst other things, that the appellant do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein, which licence was to continue in force from the 10th October then next until the 10th October then next following.

Three police constables of the said borough of Plymouth were then examined, and the following is the whole of the evidence adduced before the said justices, on the hearing and determination of the said information on behalf of the respondent.

John Julian having been duly sworn, stated as follows:—I am one of the police officers of this borough. I know the defendant; he is a licensed victualler and keeps the Queen's Hotel in George-street in this borough; he has kept it upwards of eight or nine months. On the 13th instant I visited his house with Daw and Elson about ten at night. I went into the bar through the door nearest to Mr. Willmott's. We all three went in the same way together. I found twenty-four prostitutes and fifty men in the bar. The prostitutes were very disorderly, some of them swearing and one of them had been drinking and was very much excited. I was acquainted with the faces of the women. I have seen them walking the streets with different men at different hours of the night, and I also knew they lived at brothels. We remained in the bar five or ten minutes and then left, as before stated. We left Elson outside the door, and Daw and myself went away. Elson was standing between the two front doors to the bar. The gentlemen go in at the lower door, and the women at the front door. Daw and myself remained away about an hour, and then returned to the Queen's Hotel. I saw Elson standing just where we had left him. We had some conversation with Elson and then we went into the bar again. I then counted thirty prostitutes, fourteen of whom were there on my first visit at ten o'clock, and sixty men. The women and men were mixed together, laughing, talking, and drinking; I saw no eating. They were rather closely packed together, and there was rather more than less than ninety persons. We remained in the room from five to ten minutes, and we all then left. Elson remained outside between defendant's two doors as before; Daw and myself left and returned at 11.45. We saw Elson just where we had left him. We did not go into the bar

but remained outside with Elson till twelve o'clock, and at that time and within fifteen minutes before I saw sixteen of the women come out, whom I saw in the bar at eleven o'clock. There is a large counter round the bar. They stood outside the counter; there are no chairs or seats in the bar outside the counter. The defendant was in the bar on each of my visits. On the Saturday night previous and on other occasions within these last two months I had seen these women in the same bar in the defendant's presence.

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Two other policemen corroborated the above evidence.

The attorney for the appellant, after tendering the appellant as a witness, and his evidence being rejected, addressed the bench on his behalf, and in the course of his address took the following objections:—

1. That there was no evidence upon which we, the justices, could convict the appellant of having knowingly permitted or suffered persons of notoriously bad characters to assemble and meet together in the said house.

2. That prostitutes were not persons of notoriously bad character within the meaning of the licence granted to the appellant.

3. That there was no evidence that they assembled, or met, or were there for any other purpose than for refreshment.

4. That evidence of what took place at the appellant's house on any other previous occasions, was improperly received and ought to have been rejected.

Having heard and considered the said case, we are of opinion and find that the appellant keeps the said dwelling-house under the licence before stated. We also find that on the night in question, viz., 18th May, 1861, fourteen prostitutes did meet and assemble together in the appellant's house, together with a number of men. We also find that the appellant knew the women were prostitutes, and that he knowingly permitted and suffered them to assemble and meet together in his house. We further find that the prostitutes remained in the appellant's house longer than was necessary for taking refreshment, and that they assembled and met there for the purposes connected with their vocations as prostitutes. And we are of opinion and find that they are persons of notoriously bad character within the meaning of the appellant's licence. We received the evidence that the same prostitutes, or some of them, who met at the appellant's house on the 13th May had been seen in his house on previous occasions, on the ground that it tended to prove the appellant's guilty knowledge of the bad character of the persons there on the night in question.

We unanimously gave judgment against the appellant as before stated. And hereupon we request the judgment of the Court of Queen's Bench whether our determination upon the facts and grounds previously stated, is or is not erroneous in point of law, or what further should be done in the premises.

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Welsby in support of the conviction.—The appellant was licensed to keep an ale and victualling-house, under 9 Geo. 4, c. 61, and the licence empowered him to sell by retail excisable liquors, and to permit the same to be drunk or consumed on his premises, “provided that he (among other things) do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein.” Sect. 21 imposes penalties on persons convicted of “any offence against the tenor of the licence.” Under this section the appellant was fined 5*l.*, for permitting persons of notoriously bad character to meet and assemble in his house. In support of the information it was proved that, on one occasion, at ten p.m., twenty-four prostitutes and fifty men were in the bar, the women very disorderly and swearing, and at eleven p.m., the same night, there were thirty prostitutes and sixty men, and they remained there some time, much longer than necessary for the purpose of taking refreshment. [CROMPTON, J.—In *Reg. v. Oddy* (2 Den. C. C., 5 Cox Crim. Cas. 210), it was held, that, upon a charge of feloniously receiving stolen goods, the possession of other stolen goods not connected with the immediate charge is not admissible as evidence of guilty knowledge. So here it is no more than evidence of bad character that the appellant had been guilty of a similar offence a few days before.] No: this case goes further; it was proved that the same prostitutes, or some of them, were present on both occasions. As to the second point, the appellant was rightly excluded from being a witness. This was decided in *Cattell v. Ireson* (27 L. J. 167, M. C.), where it was held that the defendant was not an admissible witness on an information for unlawfully using engines for the purpose of taking game, under 1 & 2 Will. 4, c. 32, s. 23.

Lopez for the appellant.—Prostitutes are not persons of notoriously bad character within the meaning of the licence. The provision was pointed at thieves and persons of criminally bad character. In *Greig v. Bendino* (27 L. J. 294, M. C.), this Court held that a magistrate was not bound to convict a person of keeping a disorderly house on evidence that twenty prostitutes and a number of men were in the house together for some time after he had been warned, and knew that the women were prostitutes. [WIGHTMAN, J.—The enactment is not to be held to be a denial of provisions or refreshment to persons of that class, but to prevent them assembling together.] A meeting and assembling together implies a common design; here there was no evidence of anything of the kind. As to the second point: the appellant ought to have been admitted as a witness under the 14 & 15 Vict. c. 99. This information was not a criminal proceeding. The offence was only a breach of a condition in the licence; it was not made an offence by direct enactment. In bastardy and fiscal cases the defendant is admissible: (*The Attorney-General v. Radloff*, 10 Ex. 84; *Legg v. Pardoe*, 9 C. B., N. S., 298.)

WIGHTMAN, J.—I am of opinion that the conviction ought to be affirmed. The evidence before the magistrates was, in my

judgment, sufficient to make out the case. The only point on which there could be any doubt is the last one. This appears to me to be a criminal proceeding within the 14 & 15 Vict. c. 99. On sect. 21 of 9 Geo. 4, c. 61, it seems clearly a criminal offence. It says: "Any person licensed under this Act who shall be convicted of any offence against the tenor of the licence to him granted shall be adjudged to be guilty of a first offence against the provisions of this Act relative to the maintenance of good order and rule," and for that the punishment is a fine; and in a later part of the same section it is enacted that "if proof shall be adduced to the satisfaction of the justices that such person so charged is guilty of the offence with which he is so charged, such person shall be adjudged to be guilty of a third offence against the provisions of this Act, and to pay a fine." It seems to me clearly to be a criminal offence, and I therefore think the public-house keeper was properly excluded from being a witness. It would be going too far to hold, as suggested by my brother Crompton during the argument, that the defendant might be compellable to prove the information against himself.

CROMPTON, J.—I am of the same opinion. As to the admissibility of the evidence of what took place on a former occasion at the appellant's house, I had some doubt; but Mr. Welsby removed that doubt. I think there was some slight evidence of knowledge that the women were prostitutes and of notorious bad character. As to the other point, I am clearly of opinion that the magistrates were right in refusing to admit the appellant as a witness. I do not mean to say that punishment is necessary to make it a criminal proceeding. This was a criminal and not a civil proceeding. Bastardy has been treated as a civil proceeding, and so when a remedy has been given to the party aggrieved. This, however, is an offence against public order. In the *Attorney-General v. Radloff* it was an information at the suit of the Crown for excise penalties. In the present case the convicted person is to be punished for the sake of the public, according to the magnitude of the offence.

Conviction affirmed.

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COURT OF QUEEN'S BENCH.

April 24, 1862.

(Before COCKBURN, C.J., CROMPTON, J., and
BLACKBURN, J.)REG. v. THE UNITED KINGDOM ELECTRIC TELEGRAPH
COMPANY (LIMITED.) (a)*Highway—Nuisance—Telegraph posts.*

On an indictment for a nuisance in obstructing a highway by erecting telegraph posts upon it, the judge directed the jury—first, that in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences one on each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages; secondly, that a permanent obstruction erected on a highway, placed there without lawful excuse, which renders the way less commodious to the public, is an unlawful act and a nuisance at common law, and that if the jury believed that the defendants placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages and horses, or foot passengers, upon the parts of the highway where they stood, the jury ought to find the defendants guilty, and that the circumstances that the posts were not placed upon the hard or metalled part of the highway or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict:

Held, that these directions were right.

INDICTMENT for the obstruction of a highway by the erection of telegraph posts thereon, removed into this court by certiorari, and tried at the last Aylesbury Assizes before Martin, B.

The first count of the indictment charged the defendants with digging up and removing, and misplacing and digging holes in the footway on the south side of the turnpike-road from Beaconsfield to the river Colne, and erecting and placing posts, with wires fastened to both sides of the posts, upon the said footway, and continuing the same, and thereby obstructing and incumbering the highway.

The second count charged the defendants with obstructing and incumbering High-street, in the town of Beaconsfield, in a similar way.

The other counts charged similar obstructions to highways in other and different parts of the county—in the parishes of Denham, Iver, Chalfont, St. Peter's, Beaconsfield, Wooburn, and Chipping Wycombe.

The defendants pleaded not guilty.

It appeared at the trial that the telegraph posts in question were in all cases erected with the assent of the authorities who were the immediate guardians of the highway, and in some instances were erected on the highway, but in most cases upon the strips of land by the side thereof, and in some cases in spots where such adjacent strips were so broken up or covered with briars as to be practically impassable. After a good deal of evidence had been given on behalf of the prosecution, Martin, B., told the counsel that he should direct the jury as follows:—

1. In the case of an ordinary highway (although it may be of a varying and unequal width) running between fences, one on each side, the right of passage or way *prima facie*, and unless there be evidence to the contrary, extended to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not to be confined to the part which may be metalled or kept in repair for the more convenient use of carriages or foot passengers. 2. That a permanent obstruction erected on a highway, and placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law; and that if the jury believed that the defendants placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers upon the part of the road where they stood, the jury ought to find the defendants guilty on the indictment; and that the circumstances that the posts were not placed on the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right of the Crown to the verdict.

Upon this, the defendants' counsel said that it would be useless

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to keep up the defence any longer, and a verdict was then taken for the Crown.

April 17.—*O'Malley* moved for a new trial, on the ground of misdirection; and cited *Steel v. Prickett*, 2 Stark. Rep. 463; *Reg. v. Russell*, 3 El. & B. 942; *Rex v. Tindal*, 6 A. & E. 143; *Reg. v. Betts*, 16 Q. B. 1022; *Reg. v. Wright*, 3 B. & Ad. 681; *Rex v. Sheffield*, 2 T. R. 106.

Cur. adv. vult.

April 24.—CROMPTON, J.—This case was moved by Mr. O'Malley before the Lord Chief Justice, my brother Blackburn, and myself. It comes before the Court in rather an unusual shape. It appears that, on the evidence for the prosecution being given, or rather before the evidence for the prosecution was closed, my brother Martin stated what he should say to the jury as a direction to them; and upon that the defendants' counsel said, that if that was to be the direction to the jury, it was useless for the case to go to them, and my brother Martin very properly took the course of putting down in writing what his direction was. The case, therefore, comes before this Court in the shape of a misdirection on these written propositions; and the question is, whether we can see that there was any misdirection in those propositions. The indictment was against the United Kingdom Electric Telegraph Company for putting their posts on a high road so as to obstruct the public and passengers in the use of the high road. We did not give judgment before hearing the case of *Reg. v. Train*, because we thought it was possible that something might be said in the course of that case (and nearly the same authorities were cited in both cases) that we might wish to consider. Having heard the case of *Reg. v. Train* it does not appear to us that there is anything to prevent our giving judgment in this case now. My brother Martin laid down two propositions, and all that we have to do is to examine and see whether or not we can find any ground of misdirection in his summing up. If there is a misdirection it must be taken as if the case had gone to the jury on a misdirection, but we must see distinctly that there is something wrong in what my brother Martin stated to the jury before we can interfere by way of new trial. Upon the subject of the first proposition he says, "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way *prima facie*, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers." That seems to us to be a very proper direction. An objection was made to it in two ways by Mr. O'Malley. It was said that that would apply to cases where there is a highway open to a considerable green sward or land which may be inclosed by the lord of the manor, if connected with the waste, or by the landowner, if it belongs to the landowner.

and that the direction to the jury would take in a place of that kind which is really not a part of the highway. But I own it strikes me that my brother Martin guards carefully against that. He speaks of an ordinary highway as running between fences, and he says that *primâ facie* that is to be taken as a highway; and I think every one would say, as Lord Tenterden said, in *Rex v. Wright*, "I am strongly of opinion, when I see a space of fifty or sixty feet, through which a road passes between inclosures, set out by an Act of Parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy, the whole may not have been kept in repair." No doubt that is the highway according to one of the late cases (*Williams v. Wilcox*, 8 Ad. & El. 329), where the Court were considering whether the right of passage over water was the same as a right of passage over land, and which the Court said extends over every part of it. That really is the effect of what my brother Martin says. He says: "*Primâ facie*, and unless it is explained, the public have a right to pass over the whole," and I think it must be taken in connection with what he said at the end, "and the public are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers." The proposition is confined to the case of an ordinary highway running between fences, though it may be of varying and unequal width. That is the principle of *Rex v. Wright*, which is a very strong case, and the principle is also laid down in several other cases which are referred to in *Rex v. Wright*. Taken altogether, I think it comes to this, that, *primâ facie*, when you look at a highway running between fences, unless there is something to show the contrary, the public have a right to the whole, and are not confined to the metalled part of it. Mr. O'Malley was not able, when we asked whether he would confine it to the metalled part, to show any other defined line. He suggested two cases which I have referred to before, and said this might not be a part of the highway, but might be a part of the waste or part of the land of the freeholder, to which the road did not extend. If there was an acre of land before you got to the hedge itself, that would be excluded, in my mind, by what my brother Martin says, as to not being confined to the metalled road. So in the other case that Mr. O'Malley pressed us with. He said, supposing a part of this is a rock, or something of that nature on which no passenger can go, that is excluded by the circumstances my brother Martin mentions. When you consider it, that is not a part of the high-road. If there is a rock standing, or if there is a house which was built before the road was dedicated to the public, it is not a part of the road. Therefore, taking this first direction, that the whole of the road between fences *primâ facie* is to be taken as the road, and that you are not confined to the metalled part, that appears to us to be correct. Then, in point of fact, the first proposition seems to be little more in effect than saying, as was said in the authorities I referred to, and

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in several other authorities, that the public have a right of passage over the whole of the highway. The second proposition is larger one. It is, "that a permanent obstruction erected on highway placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law, and that, if the jury believed that the defendants placed, for the purposes of profit to themselves, posts with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon the indictment, and that the circumstances that the posts were not placed upon the hard or metalled part of the highway, or upon the footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to 'the verdict.'" Now that appears to us to be substantially a proper direction, because in effect it comes to this, whether there is a practical obstruction to the public using the highway. All the cases cited by Mr. O'Malley come to that, and it was so explained in the last case of *Reg. v. Russell*; that is what is called there a mathematical obstruction, or an obstruction that was not practical—so put, I think, by myself—there being a supposed nuisance upon the sands from children building erections upon the sands. Mathematically or geologically speaking, that would be an obstruction in some possible way, as throwing a stone; but you must look to see what the practical meaning of it is. My brother Martin, I think raised that point by saying, "so as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty." In the case of *Reg. v. Russell* the jury found in effect that there was no practical nuisance—at least that was the construction that we put upon it, and the jury having found that, that was an answer to the indictment. But where it is found that there is a practical obstruction—and I understand my brother Martin's statement to be that—on a part of the highway by which the public are prevented from using it; that clearly is a nuisance according to all the definitions of nuisance. The learned Baron is also right in saying that the circumstance that the part passed over is not metalled or repaired for purposes of convenience, as has been said in several cases, really makes no difference, nor does it make any difference that sufficient space was left. According to *Rex v. Wright*, where Lord Tenterden went into the subject with great force, the public are entitled to all the space on the sides of the highway, as he said, for the purpose of light and air, and parties cannot withdraw any part of the highway from the general purposes of traffic with impunity. We must take it

that the jury found these facts in the way put before us, that the defendants did keep up posts of such size and solidity as to obstruct and prevent the passage of horses and carriages or foot passengers upon the parts of the highway where they stood. It was put by Mr. O'Malley that the case ought to have gone to the jury, for that some of the posts appeared, by a photograph that was produced, to be on inaccessible parts of the high road. I think upon this direction, if that had been so, it would not make any difference; because, if half-a-dozen posts are on inaccessible parts of the highway, even supposing they could be lawfully put there, it would be no object to the company to have these few posts left. It was said that there were different counts, and that there was a verdict upon all those counts. I think, if any were subject to those exceptions, the defendants ought to have said they had some of those posts which would come within the exceptions referred to by my brother Martin. They did not do that, and it would be quite useless to grant a rule as to two or three of those posts; indeed, we could not do it as it is left to us, because Mr. O'Malley did not ask for a verdict as to those particular posts. We have not the power of granting a rule for a new trial, unless we see that there is something to be complained of in the above two propositions. I take them as amounting to this, that, *prima facie*, the high road is not confined to the metalled part, but runs to the fences or boundaries of the high road, and that if there is a practical obstruction upon that which prevents parties using it as a highway, that is a nuisance. That is the effect of the summing up, which appears to me to be correct, and therefore I think that there should be no rule.

BLACKBURN, J.—I am of the same opinion, but I do not think it necessary to add anything to what has been said.

Rule refused.

*Wilson, Bristows, and Carpmael, attorneys for the prosecution,
Richards and Walker, attorneys for the defendants.*

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(Before CROMPTON, BLACKBURN, and MELLOR, JJ.)

REG. v. TRAIN AND OTHERS.(a)

Nuisance to highway—Street tramways—Consent of vestry—Metropolis Local Management Act 1845—Judgment as against some of the defendants—New trial.

To withdraw a part of the public highway from the use of the public is a general nuisance. A street tramway is such a withdrawal and such a nuisance.

An indictment charged the defendants with a nuisance by laying down an iron tramway on a common highway, and with conspiracy to commit a nuisance. It appeared at the trial that the tram was laid down by the defendant Train with the sanction of the vestry of Lambeth, in whom the management of the highways of the parish is vested by the Metropolis Local Management Act 1845. The evidence for the prosecution proved that the tramway was a source of danger and inconvenience to the public using the highway in the ordinary manner. The jury then interposed, and expressed their opinion that the tramway obstructed, in a substantial degree, the ordinary use of the highway for carriages and horses, and rendered it unsafe and inconvenient in a substantial degree. The defendants proposed to give evidence to show a great number of persons used the vehicles running on the line, whereby a large amount of expenditure by the public was saved:

Held, that such persons were not the persons using the highway in the ordinary manner, and that such evidence was inadmissible; and that the vestry had no power, under the 98th section of the Metropolis Local Management Act, to grant permission to the defendant Train to lay down such tramway.

THIS was an indictment for laying down a tramway on the high road between Westminster-bridge and Kennington. Train was the projector, and Hathaway his agent and foreman; and the other defendants members of the Lambeth vestry, who granted their permission to lay down the line of tramway.

The first count of the indictment charged the defendants Train and Hathaway, and certain members of the Lambeth vestry, with

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

a nuisance by digging holes and trenches in the public highway between Westminster-bridge and Kennington, and with removing soil, with laying down an iron tramway, and laying down timber and rails. The second count charged the defendants with a conspiracy to obstruct and render dangerous the said highway, and that in pursuance of such conspiracy they did dig, entrench and cut into the said highway, and make deep holes and remove soil and lay down an iron tramway, and lay down timber and rails, and thereby obstruct the said highway. The third count charged the defendants with a conspiracy by doing certain acts to obstruct and render dangerous the highway; and the fourth count charged a conspiracy without setting out the acts. Plea, not guilty.

The indictment was removed into this court by *certiorari*, and at the trial at Kingston at the last Spring assizes, before Erle, C.J., it appeared that the nuisance complained of was an iron tramway for omnibuses laid down in the highroad from the Surrey side of Westminster-bridge to Kennington; that it had been laid down by the defendant Train and his foreman Hathaway with the sanction of the Lambeth vestry, in whom the management of the highways of the parish is vested by the Metropolis Local Management Act 1845. Evidence was adduced on the part of the prosecution of accidents, and the inconvenience occasioned by the tramway, when the jury interposed, and expressed their perfect conviction that the tramway in question obstructed in a substantial degree the ordinary use of the highway for carriages and horses, and rendered it unsafe and inconvenient in a substantial degree. Evidence was tendered for the defence to show that a great number of persons used the omnibuses which ran on the tramway, whereby a large amount of expenditure by the public was saved, and that this sort of conveyance was more expeditious and more comfortable than the old omnibus; but the learned Judge refused to admit it, and ruled that if the act complained of was dangerous and inconvenient in a substantial degree to a part of the public having a right to use the way, it would be a nuisance, and that the evidence offered as to its convenience as to another part of the public would be no defence. A verdict was taken for the Crown against the defendants Train and Hathaway, leave being reserved to enter the verdict for those defendants if the Court should be of opinion that they were justified in what they had done under the agreement with the vestry, and that the vestry had power to authorise the laying down of the tramway under the Metropolis Local Management Act, 18 & 19 Vict. c. 120.

Bovill (*Knapp* and *C. E. Pollock* with him), moved to enter a verdict for defendants Train and Hathaway, pursuant to leave, or for a new trial, on the ground of misdirection, rejection of evidence, and that the jury disregarded the evidence proposed to be given. He referred to *R. v. Russell* (6 B. & C. 566); *R. v. Ward* (4 A. & E. 384, 389, 404), and contended that it was a question for the jury whether what was done was not a reason-

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able arrangement of the highway for the convenience of the public generally using it, and for the accommodation of traffic passing along it: (*Lord Grosvenor's* case, 2 Stark. 511, 57-*R. v. Morris*, 1 B. & Ad. 441, 447; *R. v. Betts*, 16 Q. 1022, 1036, 1037.) Many things are done which are beyond doubt an obstruction of the highway, and an inconvenience to the public using it, but which are not a nuisance, because they are a benefit to the public generally. A footpath, for example, deprives people using the road of a portion of it, yet this cannot be considered a nuisance. Then, as to the consent given by the vestry, the Metropolis Local Management Act 1845 (18 & 19 V. c. 120), by sect. 98, enacts that it shall be lawful for every vestry from time to time, to cause all or any of the streets within the parish to be paved or repaired when, and as often, and in such form and manner, and with such materials as such vestry think fit; under that clause the vestry had power to give their assent this tramway being a species of pavement which they had power to adopt.

Garth, on behalf of the vestry, moved for a new trial.

April 24.—CROMPTON, J.—We have had to consult some of the judges on other cases, and my brother Mellor has taken the opportunity of consulting Erle, C. J., on the case we have just heard, *Reg. v. Train and others*, and we find from him that there was nothing like a bargain that the point should be actually reserved, and that we are at perfect liberty to deal with it exactly in the way we should in any ordinary case in which the question is whether there should be a new trial or not; and, therefore, unless we entertain some doubt about the matter, we ought not to grant a rule; we ought not to raise doubts where we entertain none, and we all of us entertain a very strong opinion that this conviction was proper and right, that there is no ground for disturbing it on the part of the defendants whom Mr. Bovill represents, and that we ought to refuse the rule on these grounds. It seems clearly admitted that this would be a nuisance unless it fell within Mr. Bovill's proposition, which I will read directly, as he stated it. He has stated it very clearly to us, and properly. It is admitted that there was strong evidence one way, and no evidence that could alter the opinion of the jury as to this being a nuisance, dangerous to the ordinary passengers on the highway. Mr. Bovill tried to distinguish the case from those which have settled the law. He says, that you cannot, for the advantage of one part of the public, commit acts which will be a nuisance to the rights of others who have rights of passage over water, or matters of that kind. Admitting that this would be, on the evidence given, a nuisance to the passers by in the ordinary way on the highway, yet this is such a benefit to certain persons who would use this new mode of communication that, taking altogether, there was a question for the jury whether it could be considered as a nuisance. His proposition is this:—*F* says, "My contention is, it is a question for the jury whether

what was done was not a reasonable and convenient arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the traffic passing along it." He is obliged, as it struck me at the time, to confine his proposition and to take his case out of the cases that have so clearly established the law the other way. He is obliged to introduce, as part of his proposition, an arrangement of the highway for the convenience of the public generally using that highway, and for the accommodation of the public passing along it. It appears to me that, admitting his proposition to be true, he does not bring this case within it, because it appears to me this is not any arrangement for the ordinary use of the highway, such as the alteration of the footpath, or of the pavement, and matters of that kind. Admitting generally that his proposition might be maintainable, it appears to me that this is not making any arrangement for the use of the highway in the ordinary sense of using the highway, but on the contrary it seems to me that it is practically withdrawing so much of the highway from its use as an ordinary part of the highway. Mr. Bovill says that the running of the carriages is not the charge in the indictment, but it arises before us in this way, for the laying the tram is clearly a nuisance according to the finding of the jury and the evidence. Unless he can make out that the use of the carriages brings the case within the rule—and in my opinion it does not do so—I think, so far from being an arrangement for use of the highway by traffic using it as a highway, it is an arrangement quite different from the ordinary use; it is, in effect, withdrawing so much, as I put it several times to Mr. Bovill, from the regular ordinary use of the highway. It seems to me idle to suppose you can use the part of the highway taken up by the tramroad. A carriage meeting one of these machines, which is confined to the tram, and cannot give and take the road, does not meet it under ordinary circumstances, and must give way to it, so that it seems to me to be withdrawing so much from the highway that it may be used as a tramway; and that is the way in which all these obstructions arise, such as in the case we have just disposed of (*Reg v. The United Kingdom Telegraph Company*), and all others where you withdraw a part from the public: it is a general nuisance. Now, it seems to me, that however advantageous this may be, as Mr. Bovill says, and no doubt it is very important to the persons interested in it, and is a very useful invention, and one which may save a deal of money, and may be useful to persons travelling by it; still those are not persons who want to use it in the ordinary way of using a highway, and I think it falls within that class of cases of *Rez. v. The Longton Gas Company* (29 L. J., M. C. 188), which we took a great deal of pains in considering, where some pipes were laid in the highway by a gas company, without the leave of the Act of Parliament, and we held the company indictable for a nuisance. So, when parties introduce a new mode of conveyance, which is not suitable

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to the old mode of a high road, they must take the almost constitutional course of getting an Act of Parliament, by which they are put under such regulations as will protect the public. The only other question is, whether there was any evidence of this being for the ordinary purpose of the high road, which ought to go to the jury. It does not appear to me that there was any evidence suggested to show it was. It was put, that it was very beneficial to persons who wanted to remove from spot A. to spot B. So would an ordinary railroad be beneficial to persons in that situation; but it does not appear to me that there is any evidence at all to bring the case within Mr. Bovill's proposition, that this was an arrangement of the highway for the convenience of the public using the highway. I think there was no evidence to go to the jury upon that, and it comes before us as on a motion for misdirection. I should be very glad if the parties were able to take the decision to a higher court. They could not have done that if we had granted the rule; but as we none of us entertain any doubt, it is consistent with our duty to grant a rule, but it is a comfort to me to suppose that if we are wrong in any way, this judgment is not binding on the defendants, and that they can contest it in another indictment, and they can put it on the record in the way of a special verdict, and so get the opinion of a court of appeal. Therefore, we think, or I think at all events, that this is clearly established to be a nuisance by the evidence and the finding of the jury in that respect, unless brought within Mr. Bovill's rule. It is not brought within Mr. Bovill's rule, but, on the contrary, there is no evidence that could have gone to the jury proper to show this was an arrangement of the highway for the benefit of the public using the highway as a highway, and therefore, I think, the rule should be refused. There was a second point Mr. Bovill took, that they were protected under the Metropolitan Local Management Act, for that this was a mode of paving the metropolis. It seems almost ludicrous to say that making tramway of this kind was a mode of paving. Then another motion was made by Mr. Garth, and I think on some of the points there should be a rule, if it is thought worth while to go on with it. I cannot help thinking it is a great pity because Mr. Garth's clients, if he succeeds, can have no cost, and I do not see any use in keeping up the supposed discord in the parish, or that one party should have a triumph in having a question of corporation law decided one way or the other; but, as it is before us, we must decide it. The first point Mr. Garth makes is, that these parties are merely liable as corporators. My strong notion is, that if individual corporators concur in a resolution to put the corporate seal to a matter of this kind, that they may be, and some of them appear to be in that predicament personally liable, because I am supposing they actually direct the thing to be done. I fancy, if corporators were to vote to put the seal to some illegal act, such as to authorise a party to go into

another party's house, that they would be individually liable. There was some discussion as to that. I referred to that case in which we held that a corporation might be liable for a libel, but it was thought by many persons whose opinions have very great weight that a corporation was not liable. I think myself they are liable, because they might put their corporate seal to it; but I do not see that that prevents the corporators individually being liable, because I think they would be liable as accessories to a trespass, and so principals to the trespass; and I do not see, because they are part of a corporation, that individually taking part in that order which is carried out makes them less amenable for the consequences of it. That may be a question fit to discuss. And there is a further question on that part of the case, whether these parties, all of them, did interfere in the last resolution; and it may be that those who voted, for instance, to put a supposed case—very likely a resolution was moved—that it should be taken into consideration on such a day, might not be liable; therefore I think there should be a rule to see how far these individuals are made responsible. And then there is a question of whether, it being a corporate Act, that prevented their being liable individually, and whether it is brought home individually to them. That may be considered also. I think also, on the other point, perhaps, we should have hardly granted the rule; I should have doubted it very much if I had not thought it necessary to grant the rule on the point which I am coming to, because, on looking at the agreement, there may be a deal of doubt whether it is more than a permission or licence to do the act, and it might not make them liable, either as wrong-doers in trespass, and still less in a criminal point of view. I by no means say that it is not so, for the words are rather doubtful, and they do seem to authorise that measure, and that, it may be said, is impossible to be carried out without causing mischief; therefore I by no means say I am clear on that; but I think there is doubt enough on those points. The third point was the mode of paving, with which we need not trouble ourselves any more, for we have all a strong opinion that there is nothing in that. My impression is a very strong one, that in the fourth point there really is nothing: their being vestrymen will not, in the absence of some Act of Parliament which I expected would be referred to, make them liable for a misdemeanor of this kind; but, as Mr. Garth raises some doubt upon that—I do not say the subject is free from doubt, because, if anybody wanted an impossible task to perform, they might set to work to reconcile all the cases, beginning with *Sutton v. Clark*, down to the present time. I do not now say that that has been extended much to cases of misdemeanor, and I think there is not much in the point; but, as Mr. Garth takes the rule on the other two points, he may have it on that. On these three points he may have the rule; but I should express an opinion that these nice points of law ought not to be brought before us by the parties concerned, more for amusement, or for

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wishing to have an investigation for a senseless triumph in vestry, than for wishing to have any questions arising between the parties decided.

BLACKBURN, J.—I am of the same opinion. On Mr. Bovill's motion for a rule, I take it, that the facts at the trial seem to have been clear, that the tramway that was put down on this highway was proved and found by the jury to be dangerous and inconvenient to a portion of the public using the highway in the ordinary way in order to drive upon it—I think principally to those riding upon it on horseback, but still dangerous and inconvenient to a portion of those using the highway in the ordinary course: and Bovill's point was, that although it might *prima facie* be a nuisance, yet, he said, you might alter the highway so as to adapt it for the convenience of traffic in the course of the highway, that that alteration would not necessarily be a nuisance, though the course of alteration, or in consequence of it, you might produce some degree of inconvenience and danger to part of the public who were using it. He put, as instances of it, the converting part of the highway into a footpath for passengers, or the paving it with stones; that they might be dangerous to riders, though very advantageous for the heavy traffic; and without saying this precisely right, I think that probably, to a very considerable extent, that principle may be right, and though it would require our careful consideration to enunciate it precisely, so as to define the proper limits, certainly I think, to some extent, that principle might be right, and it might be a very proper question to leave to the jury in such a case, whether or no the alteration of the highway for the purpose of adapting it to the use of the traffic of the highway, was or not done so as to be a nuisance. Then, in the present case, I think the point does not arise at all, for I take it to be clear; and I do not think, from what one can collect in the discussion, that this was a proposal for an alteration of the highway for any purpose of adapting it to existing traffic, but a proposal to make an alteration on the surface of the highway, so as to adapt it to a new and substituted mode of carrying on traffic different from any mode that had been in previous ordinary use on the highway—a new and substituted mode of carrying the traffic; and the evidence that Bovill proposed to call, and which the jury said would be immaterial, on the judge's direction, and which, after that notice from the judge and the jury, was not given—the evidence proposed to be given was not to show what would have been a question of fact in dispute, but to show that this tramroad was not made of omnibuses of a sort previously in use, but with the intention of using a new and substituted mode of carrying the traffic, which would be highly beneficial to the public. If that was the fact and if it were shown that the new mode of adapting the highway would be highly beneficial to the public, I do not think it would prevent the matter being a nuisance as it exists at present. I do not think a new mode of interfering with the traffic on a highway

is a matter which can be left to a jury to consider on the balance of testimony. I think when that is the case the constitution of the country provides, what is almost now a court of justice, a regularly constituted court, that it must be considered before a committee of the two Houses of Parliament, whether or no, on the balance of the whole testimony, the introduction of a new mode, and interfering with the old common law rights of the parties, will be beneficial or no; and then allowing that to be done, subject to such restrictions and terms as they think fit. I think, if the alteration of the road, placing the tramway in a public highway, would be, as the defendants wish to contend, and for aught I know to the contrary it may be, a great benefit, that is a case to be made before committees of the Houses of Parliament, in order to obtain an Act for the purpose; but it does not afford any justification to those who interfere with the highway, not for the purpose of adapting it to the more convenient carrying of the existing traffic, but for the purpose of adapting it to a new and substituted mode of carrying that traffic, which it is said, and perhaps truly, would be more beneficial than the other. That being so, the evidence would not, in my opinion, be properly admissible, and it was not pretended to say, this was the old mode of carrying on the traffic, but merely to show that it would be beneficial; and the direction which I take to have been given was in itself perfectly correct. Then as to the next point, on which it is contended that this was not a nuisance, because the vestry have been parties to this, and the vestry have a general power to repave and repair the streets in the mode they think fit, I agree with my brother Crompton, that to say that laying tramways is a mode of repairing, is really a proposition that requires no answer. And on the ground that Mr. Garth has put, it is quite sufficient to say, the rule *nisi* will be granted on the grounds my brother Crompton has stated; but I think, considering how the matter stands, that there is no verdict against those defendants, and if they get a verdict for that, it can do them no good, neither save them expense, or procure them costs; and if they fail, as I can see no prosecutor who can get anything from them, it is for the wisdom of both sides to consider; but it seems to me far the best thing to let the rule drop, and let nothing be said on either side, or else to enter a *nolle prosequi*.

MELLOR, J.—I think, in this case, the direction given to the jury by the Lord Chief Justice is right; and the moment it is considered that there was no evidence offered to the jury, and it is to be taken as a conceded fact that this tramroad is dangerous to persons travelling in carriages and on horseback having the same right to use the highway as others—the moment that is conceded, there is an end of the case, because the countervailing advantage to a portion of the public, by which they economise their funds and save 10,000*l.* a-year, is not the same benefit to the public itself. The proposition of Mr. Bovill may be accurately applied to some change of the highway, that is to say, if some

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mode of altering the highway could be adopted so as to effect the better use of it as a highway, in the ordinary course of the use of the highway, it may be a question, some time or another, whether it is, on the whole, beneficial or not; but that is not a case like the present, where it is conceded, that to a portion of the public it is dangerous and inconvenient. It follows, then, as a matter of course, the only evidence tendered by Mr. Bovill was evidence of the countervailing benefit to those persons, who, it was said, would in the aggregate save as much as 10,000*l.* a-year by the change. That appears to me clearly not admissible, and I think the Chief Justice was perfectly right in rejecting the evidence; and I am of opinion, on all the grounds taken by Mr. Bovill, there ought to be no rule. With reference to the motion of Mr. Garth, I do not wish to say anything more than has been said by my learned brethren.

A rule *nisi* for a new trial having been granted on behalf of the defendants, who were vestrymen, the prosecutor entered a *non prosequi* as to them; and Mr. Train and his foreman were subsequently brought up for judgment. The Court fined Mr. Train 500*l.*, and his foreman 1*s.*

COURT OF CRIMINAL APPEAL.

June 7 and 14.

(Before COCKBURN, C. J., ERLE, C. J., WIGHTMAN and WILLIAMS, JJ., MARTIN, B., WILLES, J., BRAMWELL, B., BYLES and BLACKBURN, JJ.)

REG. v. HORATIO SAMUEL FLETCHER. (a)

Fraudulent trustee—20 & 21 Vict. c. 54—Express trust in writing—Savings bank—Rules.

A savings bank was duly constituted according to the 9 Geo. 4, c. 92; 3 Will. 4, c. 14; and 7 & 8 Vict. c. 83, of which the prisoner was a trustee, and also treasurer and secretary, or actuary, and acted as such. By the rules of the bank, the trustee and manager was declared to be personally responsible and liable for all moneys actually received by him on account of or to and for the use of the institution, and not paid over or disposed of according to the rules; and the secretary was to be liable for all money received, and was to pay regularly to the treasurer the balance due after each day's business. By the eighth rule the several sums of money belonging to the institution which the trustees thereof are authorised to invest under the 9 Geo. 4, c. 92, or under the rules or regulations of this institution, were to be paid into, and invested in the Bank of England, in the names of the Commissioners for the Reduction of the National Debt, according to the provisions of the said Act, and no such sum or sums of money were to be paid or paid out by the trustees in any other manner or upon any other security whatever, except such sums of money as from time to time should necessarily remain in the hands of the treasurer, to answer the exigencies thereof. That the trustees should pay into the Bank of England any money, not less than 50l., to the account of the Commissioners for the Reduction of the National Debt, upon the declaration of the trustees, or any two or more of them, that such moneys belonged exclusively to the institution. The rules gave depositors the usual power of drawing out moneys deposited. The jury found, as a fact, that the prisoner was a trustee of the savings bank, and that, whilst he was such trustee, he converted and appropriated to his own use divers sums of money (not less than 50l. each) which had been paid into or deposited in the savings bank, whilst he was such trustee, with intent to defraud:

Held, that the prisoner was a trustee within 20 & 21 Vict. c. 54, and that the rules were an instrument in writing creating an express trust within sect. 17.

CASE stated for the opinion of this Court by Mr. Baron Channell:—

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The prisoner, Horatio Samuel Fletcher, was tried before me at the last assizes for the county of Stafford, under the statute 20 & 21 Vict. c. 54, intituled, "An Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property."

The first count of the indictment charged, that on the 1st January, 1859, the prisoner, then being a trustee of certain property, that is to say of certain moneys, to wit, to the amount 100*l.* for a public purpose, that is to say for the purpose (among other things) of receiving and investing the same for the benefit certain persons who had before then deposited the same in certain bank for savings, called the Bilston Savings Bank, before then established, and then carrying on business under the authority of certain Acts of Parliament for consolidating and amending the laws relating to savings banks, did unlawfully convert and appropriate the said moneys so amounting (to wit, to the sum of 100*l.*) to and for his own use and purposes, with intent thereby then to defraud, against the statute, &c.

The second count was the same as the first, but charged an appropriation of 100*l.* on the 8th January, 1859, with intent, &c.

The third as before, but charged an appropriation of 50*l.* on the 15th January, 1859, with intent, &c.

The fourth as before, but charged an appropriation of 50*l.* on the 22nd January, 1859, with intent, &c.

The fifth as before, but charged an appropriation of 100*l.* on the 29th January 1859, with intent, &c.

The sixth count charged that the prisoner being a trustee of certain property, that is to say, of certain moneys amounting, to wit, to the sum of 100*l.* for the benefit of certain persons who had before then deposited the same in the said bank for savings, called the Bilston Savings Bank, did on the 1st January, 1859, unlawfully convert and appropriate the said last-mentioned moneys so amounting, to wit, to 100*l.*, to and for his own use and purposes, with intent thereby to defraud the said persons who had so deposited the same as aforesaid, against the statute, &c.

The seventh count was like the sixth, but charged an appropriation of 100*l.* on the 8th January, 1859, with intent, &c.

The eighth count was like the last, but charged an appropriation of 50*l.* on the 15th January, 1859, with intent, &c.

The ninth count was like the last, but charged an appropriation of 50*l.* on the 22nd January, 1859, with intent, &c.

The tenth count was like the last, but charged an appropriation of 100*l.* on the 29th January, 1859, with intent, &c.

The eleventh count was like the first, but charged an appropriation of 100*l.* on the 19th January, 1861, with intent, &c.

The twelfth count was like the sixth, but charged an appropriation of 100*l.* on the said 19th January, 1861, with intent, &c.

Prior to the 1st January, 1859, the first day named in the indictment, viz., from the 26th March, 1839, and thence down to

and subsequently to the 19th January, 1861 (the last day named in the indictment), the prisoner was and acted as one of the trustees of a bank for savings established in the county of Stafford, being the savings bank in the indictment mentioned.

The prisoner was in 1849 appointed the treasurer of the said Savings Bank, and continued to act as such treasurer until the end of February, 1861. On his appointment as treasurer he with two sureties executed a bond in the penal sum of 500*l.* to the then Comptroller-General of the National Debt Office.

A copy of the bond accompanies and may be referred to as part of this case.

The prisoner was also, prior to the 18th November, 1844, and thence down to the end of February, 1861, the secretary or actuary to the said savings bank.

The bank was established in the year 1838.

On the 18th November, 1844, certain rules, orders and regulations for the management of the said bank from and after the 20th November, 1844, were duly certified by the barrister-at-law appointed by the Commissioners for the Reduction of the National Debt, for the purposes of the Acts 9 Geo. 4, c. 14, and 7 & 8 Vict. c. 83. A duplicate of such rules, orders and regulations, was duly transmitted to the said commissioners.

A copy of such rules, and of the certificate of the barrister so appointed to certify, accompanies and is to be taken as part of this case.

The prisoner, in the year 1859, while he was trustee of and also treasurer of and the secretary or actuary to the said bank, viz., on the 21st February, 1859, signed five several weekly accounts. These weekly accounts are all dated the 21st February, 1859, are all signed by the prisoner as treasurer of the savings bank, and also by the prisoner as secretary or actuary of the said bank. They are also signed by one Heafat as a manager of the said bank, and who was then one of the managers of the said bank. The first of these accounts purports to give, amongst other things, an account of moneys received by the bank from depositors, and of moneys paid out to depositors in the week ending 1st January, 1859.

The sum actually received in the course of that week was 334*l.* 16*s.* 2*d.*; the amount returned on the account as moneys received, is only 234*l.* 16*s.* 2*d.*; the difference, 100*l.*, is the subject of the first count of the indictment.

The second account purports to be an account for the week ending the 8th January, 1859. The sum actually paid out to the depositors in that week was 74*l.* 19*s.* 5*d.* The sum returned in the account as paid out was 174*l.* 19*s.* 5*d.* The difference, 100*l.*, is the subject of the second count in the indictment.

The third account was for the week ending the 15th January, 1859. The sum actually paid out to depositors in that week was 51*l.* 13*s.* 4*d.* The sum returned in the account as paid out was 151*l.* 13*s.* 4*d.* The difference, 100*l.*, was the subject of the third count in the indictment.

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The fourth account was for the week ending the 22nd January, 1859. The sum actually paid out to depositors in that week was the sum of 142*l.* 9*s.* The sum returned on the weekly account as paid to depositors was 192*l.* 9*s.* The difference, 50*l.*, is the subject of the fourth count in the indictment.

The fifth account was for the week ending the 29th January, 1859. The sum actually received from depositors during that week was 283*l.* 15*s.* 10*d.* The sum returned was 183*l.* 15*s.* 10*d.* The amount actually paid out was 48*l.* 12*s.* 9*d.* The sum returned on the account was 148*l.* 12*s.* 9*d.* This difference in the sums received and paid out and those returned as such in the weekly accounts is the subject of the fifth count in the indictment.

The prisoner whilst he was such trustee, treasurer and secretary, or actuary as aforesaid, viz., on the 8th February, 1861, signed a certain other weekly account purporting to be an account for the week ending the 19th January, 1861. The sum actually paid out to depositors in that week was the sum of 59*l.* 4*s.* 9*d.* The amount returned as paid out was 159*l.* 4*s.* 9*d.* The difference, 100*l.*, is the subject of the eleventh and twelfth counts in the indictment.

These weekly accounts are all signed by the defendant twice: once by him as treasurer or person holding the balance thereof mentioned in the account, and again by him as the secretary or actuary. The accounts were duly returned to the office of the Commissioners for the Reduction of the National Debt, and were produced from their office at the trial. The written part of the accounts, with the exception of the signatures thereto other than the signatures of the prisoner, is in the prisoner's handwriting. The amounts actually paid in and paid out in each week were ascertained from books which had been kept for that purpose, the entries in which books were in the handwriting of the prisoner, and the account as cast up to show the total of the weekly receipts or payments, was in figures in his handwriting. Copies, partly printed and partly written, of these several weekly accounts, marked respectively A, B, C, D, E and F, accompany and may be referred to as part of this case.

In addition to these weekly accounts, an annual account for the year ending 20th November, 1859, was, pursuant to the statute 9 Geo. 4, c. 92, s. 46, and 7 & 8 Vict. c. 83, s. 13, signed by the prisoner as treasurer and secretary, or actuary, and delivered to the National Debt Office, a copy whereof accompanies and may be taken as part of this case.

The bank was usually open on the Monday in each week: the weekly accounts were made up to the Saturday preceding. The money in hand at the close of the bank on the Monday was taken away by the prisoner from the bank to the parsonage, his private residence. On the next Monday the money was brought to the bank by the prisoner, or by his direction. The books of the bank were at the office of the bank on the Monday during office hours.

but at all other times were kept at the parsonage-house, in the residence of the prisoner.

The assets of the bank vested in Government securities have been realised; the amount realised net the cash in hand at the bank leaves, as compared with the amounts of deposits, a deficiency of 8000*l.* and upwards.

The Jury found as a fact that the prisoner was a trustee of the said savings bank in the years 1859 and 1861, and that whilst he was such trustee of the said savings bank he converted and appropriated to his own use and purposes certain sums of money which in the year 1859 and in the year 1861, and in the several months of those years stated in the indictment, had been paid into, or deposited in the said savings bank whilst he was such trustee as aforesaid, and that the prisoner did so convert and appropriate the said moneys with intent to defraud, as stated in the indictment.

I directed a verdict of Guilty to be entered, subject to the question which I reserved, and on which I request the opinion of this Court, whether, upon the facts so found by the jury, and those stated in this case, taken together with the said rules of the said savings bank, the prisoner was a trustee within the meaning of the 21 & 22 Vict. c. 54, as described in the several counts of the indictment, or any of them. I postponed the sentence upon the prisoner, upon his entering into his own recognizance, himself in 750*l.*, and two sureties in the same amount.

W. F. CHANNELL.

Copy of the bond accompanying the case:—

"Know all men, by these presents, that we Horatio Samuel Fletcher, incumbent of St. Leonard's Church, in the township of Bilston, in the county of Stafford, and treasurer of the savings bank established at Bilston aforesaid, and Richard Westley Fletcher, of Bilston aforesaid, gentleman, as surety on behalf of the said Horatio Samuel Fletcher, are held and firmly bound unto Samuel Higham, Esq., the present Comptroller-General of the National Debt Office in the sum of 500*l.* sterling, to be paid to the said Samuel Higham (as such comptroller-general), or his successor Comptroller-General of the National Debt Office for the time being, or his certain attorney, executors, administrators, or assigns, for which payment to be well and faithfully made, we jointly bind ourselves, our heirs, executors, and administrators, and each of us severally and apart from the other of us bindeth himself, his heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated this 9th day of January, in the year of our Lord 1849."

"Whereas the above bounden Horatio Samuel Fletcher hath been duly appointed treasurer of the savings bank established at Bilston as aforesaid, and he, together with the above bounden Richard Westley Fletcher, as his surety, have, pursuant to an Act of Parliament made and passed in the session of the 7th and 8th years of the reign of her present Majesty, intituled 'An Act to amend the laws relating to savings banks, and to the purchase of Government annuities through the medium of savings banks,' entered into the above written bond or obligation, subject to the

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conditions hereinafter contained. And whereas the said bond has been approved of by two trustees and three managers of the said savings bank, as good and sufficient security. Now the condition of the above written obligation is such that if the said Horatio Samuel Fletcher, his executors and administrators, do and shall from time to time, upon request or demand made in pursuance of an order signed by not less than two trustees and three managers of the said savings bank, or at general meeting of the trustees or managers thereof, give in or deliver up true and perfect accounts in writing of all moneys received by him and of all payments made by him thereout as such treasurer as aforesaid, to the said trustees or managers, or to such general meeting as aforesaid, or to such person or persons as shall be nominated or appointed by two trustees and three managers of the said savings bank, or at such general meeting to receive the same, to be examined and allowed or disallowed by the said trustees or managers respectively, and shall and do on the like request or demand pay over all the moneys remaining in his hands, and assign and transfer or deliver up all securities and effects, books, receipts and vouchers, and all and every other books, writings, documents, papers and property whatsoever relating to said office of treasurer in his possession, power, or control, to the said person or persons appointed to receive the same as aforesaid, and likewise do and shall in all respects justly and faithfully perform and fulfill his said office of treasurer of the said savings bank, then the foregoing obligation to be void, or else to be and remain in full force and virtue. And it is hereby declared and agreed that all memorandums, admissions, declarations, accounts, writings, books, receipts and written notices made or given by the said Horatio Samuel Fletcher shall be admitted and received in evidence against the said H. S. Fletcher in the same manner, to all intents and purposes, as the same would be evidence against the said H. S. Fletcher, and this whether the said H. S. Fletcher be living or not, or within the jurisdiction of the Superior Courts at Westminster or not.

"H. S. FLETCHER. [L.S.]

"R. W. FLETCHER. [L.S.]

"Sealed and delivered by the said Horatio Samuel Fletcher and Richard Westley Fletcher, in the presence of

"THOMAS WILTON, Clerk to John Willim,
Solicitor, Bilston."

The following memorandum was indorsed on the bond:—

"7 & 8 Vict. c. 83, s. 17.

"We, two of the trustees and three of the managers of the saving bank established at Bilston, in the county of Stafford, do hereby approve of the within-written bond being taken from the said Horatio Samuel Fletcher and Richard Westley Fletcher, as good and sufficient security for the just and faithful execution of the office of treasurer of the said savings bank.

"Dated this 9th day of January, 1849.

"THOMAS PERRY	}	Two trustees.
"EDWD. BEST		
"JOSH. B. OWEN	}	Three managers.
"JOHN ETHERIDGE		
"RICHARD JEWSBURY HEAFAT		
(Witness)		"THOMAS WILTON."

The following are the material rules of the Savings Bank, referred to in the course of the argument :—

The rules were headed "Bilston Government Bank for Savings," and purported to have been made at a general meeting of the officers of the institution, held at the bank, Nov. 13, 1844.

1. The management of the institution shall be vested in a committee of twelve, to be chosen annually from amongst the trustees and managers. The committee (any three of whom shall be competent to act) shall meet on the second Mondays in March, June, September, and December, or at any other time upon the requisition of two members of the committee or the secretary.

4. That no person, being trustee, treasurer, or manager of this institution, or having any control in the management thereof, shall derive any profit or benefit directly or indirectly therefrom.

5. The committee shall appoint a secretary to transact the business of the bank, who shall give security conformably to the 7 & 8 Vict. c. 83, s. 17, and receive such allowance for his services as may be thought proper, but no fees or perquisites from the depositors. He shall be responsible for all moneys received, as well as for the accuracy of every individual account, and pay regularly to the treasurer the whole balance remaining due after each day's business is concluded.

6. The treasurer shall likewise give security conformably to the same Act.

7. That no trustee or manager shall be personally liable except for his own acts or deeds, nor for anything done by him in virtue of his office, except in cases when he shall be guilty of wilful neglect and default, nor be liable to make good any deficiency which may hereafter arise in the funds of this institution, unless such persons shall have respectively declared, by writing under their hands and deposited with the Commissioners for the reduction of the National Debt, that they are willing so to be answerable, and it shall be lawful for each of such persons, or for such persons collectively, to limit his or their responsibility to such sum as shall be specified in any such instrument, provided always that the trustee and manager of any such institution shall be, and is hereby declared to be, personally responsible and liable for all moneys actually received by him on account of or to and for the use of this institution, and not paid over or disposed of in the manner directed by the rules of the said institution : (7 & 8 Vict. c. 83, s. 6.)

8. That the several sums of money belonging to this institution, which the trustees thereof are authorised to invest, under the Act 9 Geo. 4, c. 92, or under the rules or regulations of this institution, shall be paid into and invested in the Bank of England in the names of the Commissioners for the Reduction of the National Debt, according to the provisions of the said Act enabling the trustees to make investments in the names of the said commissioners, and no such sum or sums of money shall be paid or laid out by the trustees in any other manner, or upon any other security whatever, except such sums of money as from time to time shall necessarily remain in the hands of the treasurer to answer the exigencies thereof. Any depositor, or any trustee or trustees acting on behalf of any depositor or depositors of any friendly society, or any charitable or provident institution or society, shall not be restrained or prevented from withdrawing from this institution, upon giving the notice hereinafter mentioned, any sum or sums of money which shall have been

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deposited by such depositor, friendly society, charitable or provident institution or society, and investing the same in any other securities. That the trustees shall pay into the Bank of England any sum or sums of money, not being less than 50*l.*, to the account of the Commissioners for the Reduction of the National Debt, upon the declaration of the trustees or any two or more of them that such moneys belong exclusively to this institution.

25. That any depositor shall be at liberty to withdraw the whole or any part of his or her deposit and interest, upon giving, during banking hours, fourteen days' previous notice, and in case any notice is given and the money not accordingly withdrawn, it shall be considered a fresh deposit, and carry interest again from the succeeding 20th day of the month.

This case was twice argued (May 3) before Erle, C.J., Martin and Channell, BB., and Blackburn and Keating, JJ., who, not agreeing in opinion, directed the case to be again argued before all the judges. The case now came on accordingly.

June 7.—*Matthews* for the defendant.—The indictment is framed upon the 20 & 21 Vict. c. 54. Sect. 1 enacts, "That if any person, being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or purpose, or shall, with intent aforesaid otherwise dispose of or destroy such property, or any part thereof, he shall be guilty of a misdemeanor. The word "trustee" in sect. 1 is narrowed by the interpretation clause (sect. 17) to mean "a trustee on some express trust created by some deed, will, or instrument in writing;" and the word "property" is to denote and include not only such real and personal property as may have been the original subject of a trust, but also any real or personal property into which the same may have been converted or exchanged, and the proceeds thereof. It is contended that the defendant was not a trustee of property within that definition. First, the defendant is not a trustee created by an instrument in writing. The rules of the society are not an instrument in writing within sect. 17. The instrument in writing must be *ejusdem generis* as a "deed" or "will:" (*Re Lord*, 1 K. & J. 90.) Then the rules are not an instrument in writing creating a trust within the meaning of the Act. The 9 Geo. 4, c. 92, s. 2; 3 & 4 Will. 4, c. 14; and 7 & 8 Vict. c. 83, were then referred to. [COCKBURN, C.J.—Suppose, independently of these Acts, a number of persons associated together for a similar object draw up a code of rules, would they not create a trust? And if a person receives money under them and appropriates it to his own use fraudulently, would he not be liable criminally?] If the person engaged by writing to take the money and hold it under the rules, no doubt he would be liable criminally; but here the trust is not created by the instrument in writing. [ERLE, C.J.—Suppose the trust is created by will, that precedes the acceptance of the trust, and the Act makes that sufficient.] All the elements to constitute the trust should be found in the written instrument. Under these

rules there is no trustee, *cestui que trust*, or trust-fund sufficient to satisfy the conditions of 20 & 21 Vict. c. 54. [BLACKBURN, J.]

The statute does not say that the acceptance of the trustees should be created by writing, but only the trust.] These rules do not create a trust; here it is to be followed by the acceptance of the trust and the deposit: (Lewin on Trusts, 56.) In the next place it is contended that there was no such express trust as alleged in the indictment. It does not appear how any one becomes a trustee, secretary, or treasurer. [WIGHTMAN, J.—Suppose a person appointed to one of these offices, and after his appointment it is said to him, "These are your rules." The word in the statute is "created" by some deed, will, or written instrument.

[MARTIN, B.—Why is not the 8th rule the creation of the trust?] The rules precede the existence of any trust, trustee, or *cestui que trust*; it is the savings bank statute that creates the trust. In the first set of counts the defendant is alleged to be a trustee of moneys for a public purpose, and it is contended that assuming a trust to exist, it is not a trust for a public purpose. In the books, public and charitable trusts are treated as synonymous: (Lewin on Trustees, p. 19.) The trust is for the benefit of the several depositors in this case, and does not fall within the known definition of a public or charitable trust: (*The Attorney-General v. Aspinall*, 2 Myl. & C. 613.)

Where the property was not applicable entirely to public purposes, but also to some purposes essentially private, it was held to be rateable to the poor-rate, not being for the public advantage only: (*Reg. v. Harrogate*, 20 L. J. 25, M. C.) As secretary, the only rule which could be said to create an express trust is the fifth rule, and that has been performed by the defendant. As treasurer, there is no rule which points out what he is to do. The treasurer is to keep the money in his hands until he receives an order directing him to pay the money to some other person. There is no express trust as to the treasurer. As to the trustee, the only express trust is the eighth rule. [COCKBURN, C. J.—Why was not the defendant guilty of embezzlement as secretary when he paid over to himself a part only instead of all that he received? BRAMWELL, B.—In his accounts as treasurer, he says he received so much only; then it follows that, as secretary, he embezzled the amount he did not pay over to himself as treasurer.] It may be the prisoner was indictable under the 7 & 8 Geo. 4, c. 29, s. 49; but the question is, can this indictment be sustained? (*Reg. v. Proud*, 9 Cox C. C. 22; s. c. 31, L. J. 71, M. C.) The depositors have not the rights of *cestuis que trust*. The relation between them and the bank is that of debtor and creditor: (*Rex v. Mildenhall Savings Bank*, 6 A. & E. 952; *Crisp v. Binbury*, 8 Bing. 394; *Tassell v. Cooper*, 9 C. B. 509.)

June 14.—*Dowdeswell* (Pigott, Serjt., with him) for the prosecution.—The defendant was properly convicted, for he was a trustee under an express trust, created by an instrument in writing within the meaning of the 20 & 21 Vict. c. 54. The word "trustee" is used in its widest sense in sect. 1, for when the framers give a

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glossary they limit the term. The defendant was a trustee, and as long as he had funds of the depositors in his hands, he was bound to apply them for their benefit, and not to his own use. As treasurer, also, he was a trustee of the funds, especially of a savings bank; he holds the cash, not as a servant, but as one of the principal members. As secretary, he was the person appointed to receive the funds, and, upon receipt, he held them as trustee for the depositors until he had paid them over. Although he might have been indicted for embezzlement, and if *Reg. v. Proud* is an authority for that proposition, still the defendant is liable upon the present indictment for holding these funds, however they came to his hands, he was liable as a trustee: (Vin. Abr. Trust, A. 1.) The prisoner was a trustee upon an express trust: (Maddock Ch. Pr. 446.) Express and implied trusts are terms of art well known to the law. The Statute of Frauds, 29 Car. 2, c. 3, ss. 7, 9, requires that all declarations or creations of trusts of lands, tenements, or hereditaments, and all grants and assignments of trusts, shall be in writing; and the 8th section speaks of trusts arising or resulting by implication or construction of law: (*Cooke v. Fountain*, 3 Swans. 591.) The Statute of Limitations does not run against express trusts: (3 & 4 Will. 4, c. 27, s. 25.) In the present case the trust is created by the rules, which operate as a declaration of trust. It is not necessary that the instrument creating the trust should contain within it everything which the trustee is required to do, or that it should convey the *corpus* of the trust to the trustees. Government Stock, Bank and East India Stock, and joint-stock shares are conveyed by transfer. It cannot be contended that trustee originally appointed by the company's deed of an insurance office is not liable for the fraudulent appropriation of the existing funds because they were not conveyed to him by the deed at the time he was appointed. All that is required by the 20 & 21 Vict. c. 54, is, that the trust should be created by an instrument in writing, that it should be an express trust as contradistinguished from oral and implied or constructive trusts. No regular formal instrument is required to create a trust: (*Bayley v. Boulcourt*, 4 Russ. 345; *Gray v. Gray*, 21, L. J. 745, Ch.; Saunders on Uses and Trusts, 343.) Mere letters and memoranda are sufficient. The statute does not require the writing to be signed by the person creating the trust. A savings bank might be created at common law, and the statute merely recognises these societies as bodies regulated by certain rules, which create the trusts, and then gives them certain protections. There is nothing so peculiar in the character of a will or deed as to prevent these rules from being an instrument in writing within the meaning of the statute. Any writing may be a will, provided it contain testamentary words, and any writing may be a deed provided it has a seal affixed. These rules are of the same nature as those that govern insurance companies, corporations, and other public associations, and they are, for the purpose of the statute 20 & 21 Vict. c. 54, *ejusdem generis* as a will or deed. Next, this was a public trust.

Lastly, the set of counts which allege that the defendant was a trustee of moneys for the benefit of the depositors was fully proved. Rules, 4, 8, and 25 show this. [WILLES, J., referred to *Holmes v. Henty*, 4 Cl. & Fin. 74. Where a majority of the trustees of a savings bank had resolved to apply a part of the increased or surplus funds to the repair of a bridge, and the money had been paid over to one of themselves, who was the bridgemaster, and it was to be a breach of trust, and that the parties were liable to refund the money.]

Matthews was heard in reply.

COCKBURN, C. J.—I am of opinion that this conviction was right, and that it ought to be upheld. The first question is, was the defendant a trustee within the meaning of the Act? I think that it is clear that he was a trustee. It was contended by Mr. Matthews that he was not a trustee, though he was called a trustee in the rules of the society, and that the defendant was only liable in an action at the suit of the depositors to repay them the amount of their respective deposits with interest. I do not concur in that argument. I think that the defendant was a trustee upon the receipt by him of the money, which he was bound to hold for the benefit of the institution until it was repaid to the depositors under the 8th rule, which creates a trust to hold the money for the benefit of the institution. I am disposed to think that this was not a trust for a charitable or public purpose within the meaning of the statute. Although a savings bank is an institution of public concern, as tending to promote thrifty habits on the part of the public, and it is desirable that the savings of the depositors therein should be protected, yet I do not think that it is a public purpose within the meaning of the Act, which appears to me to contemplate institutions such as those which are exempted by statute from liability to pay poor-rates and similar things. On the first set of counts in the indictment, the prosecution therefore fails; but on the sixth and other counts, which charge the defendant as a trustee for the benefit of the depositors in the bank, I think the prisoner was properly convicted. Looking at the whole scope of the institution, it is plain that the defendant was not to hold the funds for his own individual benefit, but for the benefit of some one else. What is the meaning of the term "institution" in the 8th rule? It includes the managers, trustees, officers, and depositors. The 8th rule speaks of the "institution." Although the trust-moneys, in point of law, belong to the trustees, yet within the meaning of this rule they belong to the institution—that is, to the rest of the persons as distinguished from himself; therefore I think the defendant was clearly a trustee for the benefit of other persons. Then, is it an express trust? It is clear that it was the defendant's duty to receive the moneys, and to pay them over. The treasurer's duty is plainly chalked out: he is to hold the moneys on behalf of the institution, retaining in his hands only so much as is necessary; and if the treasurer does not discharge that duty, he is guilty of a breach

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of trust. Therefore I think there was an express trust. The next point is, whether there was an express trust created by an instrument in writing within the meaning of the statute. To my mind it is quite clear that the trust was created by an instrument in writing, because the rules of the society give the authority to receive the money, and point out in what way there is an obligation to apply it. The trustees are to receive the moneys and invest them with the Commissioners for the Reduction of the National Debt. The same writing which empowers the trustees to receive the moneys from the depositors, and hold the same, points out the purpose to which it is to be applied by them. Then, is it an instrument in writing *ejusdem generis* as a deed or will? It is said that the rules of the society are not *ejusdem generis* as a deed or will; but, for this purpose, I think they are; for if the rules authorise the receipt of the money, and declare what the trust is, they seem to me to be an instrument in writing *ejusdem generis* as a deed or will, for they have the same effect as a deed or will, whereby a trust is created. In this case, instead of executing a deed, the defendant accepts office under a set of rules which dictate his duty. We must not overlook the intention of the Act, which was to prevent the fraudulent appropriation by trustees of moneys in their hands. The object of the proviso was to prevent implied trusts from being included in the penal provisions of this Act, and it was required that there should be an express trust as distinguished from an implied one, and that it should be in writing, and not be left to oral proof. Of the moral guilt of the defendant there can be no doubt. I entertained a doubt at one time whether the defendant could be convicted, as, by the rules, the secretary was bound to pay the moneys received over to the treasurer, and the treasurer to the trustees, and the defendant himself acted as secretary, treasurer, and trustee; but now, for the reasons I have given, I am satisfied that there was full ground for saying that the finding of the jury was right, and that the defendant was a trustee within the meaning of the Act.

The rest of the Court concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

*June 7th, 1862.**(Before COCKBURN, C. J., MARTIN, B., WILLES, BYLES and BLACKBURN, JJ.)*

REG. v. EDWARD HOLMAN. (a)

Indictment—Misjoinder of counts—Time for objecting—Election.

The prisoner was indicted in the first count for embezzlement, and in the second for larceny, as a bailee, under the 20 & 21 Vict. 54. After plea pleaded and the jury were charged, and in the course of the trial, it was objected for the prisoner that the indictment was bad for misjoinder of counts. The Court overruled the objection, and directed the prosecutor to elect upon which count he would proceed, and the prosecutor having elected to proceed upon the second count, the prisoner was found guilty thereon:

Held, that the conviction was right.

CASE reserved for the opinion of this Court.

At the General Quarter Sessions of the peace of our Lady the Queen, holden at Lewes, in and for the county of Sussex, on the 7th April, 1862, before George Darby, Esq., chairman, John Elman and others, their fellow-justices of our said Lady the Queen assigned to keep the peace in and for the county aforesaid.

Edward Holman was tried on an indictment preferred and found against him on 7th April, aforesaid, of which the following is a copy:—

Sussex, } The jurors for our Lady the Queen, upon their oath
to wit. } present, that Edward Holman, on the 28th January,
1862, being then a servant to William Lewis, did by virtue of such
his employment then, and whilst he was so employed as aforesaid,
receive and take into his possession certain money, to wit, to the
amount of 3*l.* 7*s.*, for and in the name and on the account of the
said William Lewis, his master as aforesaid, and did then
fraudulently and falsely embezzle the said money. And so the
jurors aforesaid, upon their oath aforesaid, do say that the said
Edward Holman then in manner and form aforesaid feloniously
did steal, take and carry away the said money the property of the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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said William Lewis, from the said William Lewis, his master aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, he crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Edward Holman, on the 28th day of January, aforesaid, being a bailee of certain property to wit, of certain money to the amount of 3*l.* 7*s.*, the money of Amy Head, feloniously and fraudulently did take and convert the said money to the use of him the said Edward Holman, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

At the close of the case for the prosecution, the prisoner's counsel contended that the indictment was absolutely bad for misjoinder of counts, and that the objection was fatal, although not taken till after plea pleaded, and the jury had been charged and upon the Court proposing to direct the counsel for the prosecution to elect on which count he would proceed, the prisoner's counsel further contended that the indictment was so absolutely bad that the election of counts was inadmissible.

The Court directed the counsel for the prosecution to elect on which count he would proceed, reserving, at the request of the prisoner's counsel, the points raised by him as above stated for the consideration of the Court for Crown Cases Reserved.

The counsel for the prosecution elected to proceed on the second count, and upon that count the prisoner was convicted.

The Court postponed judgment on the conviction, and ordered that the prisoner should enter into a recognizance with sureties conditioned to appear at the next general quarter sessions of the peace to be holden in and for the said county, and receive judgment on the said conviction, and remain imprisoned until such recognizance should be entered into.

The prisoner has since entered into such recognizance and been discharged from custody.

The opinion of the Court for Crown Cases Reserved is requested whether, upon the grounds contended for by the counsel for the prisoner as aforesaid, the prisoner was not, or whether he was liable to be convicted on the second count of the indictment as above set forth. (Signed) G. DABBY.

No counsel appeared on either side.

By the COURT:

Conviction affirmed.

COURT OF QUEEN'S BENCH.

June 28, 1862.

(Before WIGHTMAN and CROMPTON, JJ.)

BELASCO v. HANNANT.(a)

BARTON v. HANNANT.(a)

*Refreshment Houses Act—23 & 24 Vict. c. 27, s. 32.**Knowingly suffering prostitutes to assemble at and continue in and upon the premises—Sufficiency of evidence to sustain conviction.**Belasco v. Hannant.*

THIS was a case stated by a police magistrate of the metropolis, under 20 & 21 Vict. c. 43, and which raised the question for the opinion of the Court, whether the appellant had been rightly convicted under the 32nd section of the Refreshment Houses Act, 23 & 24 Vict. c. 27, for knowingly suffering prostitutes to assemble in and upon his premises, No. 6, Pantons-street, Haymarket.

The facts of the case were stated by the magistrate as follows:—

"Whereas, on the 25th day of April last, Samuel Belasco, of the refreshment-house No. 6, Pantons-street, appeared before me this Court on summons, to answer the complaint of the superintendent of the C division of police, for an offence under the 32nd section of the statute 23 & 24 Vict. c. 27, for that he, on the 20th day of April, 1862, at the house No. 6, Pantons-street, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, and within the metropolitan police district, being a person licensed to keep a refreshment-house at No. 6, Pantons-street, aforesaid, did knowingly suffer prostitutes to assemble at and continue in and upon his said premises, &c. Having heard the case, I find that the business of the house kept by Samuel Belasco, the defendant before me, was carried on under a refreshment licence; that the ordinary usage of the defendant is to keep his house open from about midnight to four a.m., mainly for the purpose of providing refreshment for known prostitutes; that on the morning of the day in question, between the hours named, 155 prostitutes and about an equal number of men visited the house; that the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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attention of the defendant was called to the fact that the women present were prostitutes, and he admitted his knowledge of the fact; that during the visits of the police, they (the police) saw numbers of prostitutes in the house who were not partaking of refreshment; that upon some occasions the police were kept waiting at the door, so that time was given to do away with all evidence of disorder or impropriety of conduct if any such existed; that the said prostitutes entered the house kept by said defendant either singly or in groups of prostitutes, and in the majority of cases they came out either in groups of men and prostitutes, or a man and a prostitute in pairs; and that the Haymarket, close to which the defendant's house is situated, is one of the great centres of London prostitutes between midnight and four a.m., or thereabouts; finally, that not one of the prostitutes present was apparently needy or in distress.

"On the other hand, I find that the police discovered no trace of indecency, drunkenness, or disorder in the said house, and that it is a *bonâ fide* supper-house; that a considerable number of suppers were actually served on the night in question; that it did not appear that those prostitutes who were not seen to take refreshment tarried in the house for a longer time than would have been needful to procure refreshment, had such been their intention. The said house is a fair sample of the Haymarket supper-house used by the upper classes of prostitutes of the district.

"Upon these facts I found that the prostitutes did assemble at the said house of the defendant in furtherance of prostitution, and I convicted the defendant in the penalty of 20s.

"The question for the opinion of the Court is whether, upon finding these facts, the conviction was right in point of law.

"A. A. KNOX, Metropolitan Police Magistrate.

"Police-court, Marlborough-street, May 22, 1862."

Field for the respondent.—The conviction was under the Refreshment Houses, &c. Act, 23 & 24 Vict. c. 27, s. 32, which enacts that "Every person licensed to keep a refreshment-house under this Act who shall (without a licence for that purpose) sell or permit, or suffer to be sold within such refreshment-house any intoxicating liquor, or shall knowingly suffer any unlawful games or gaming therein, or knowingly suffer prostitutes, thieves, or drunken and disorderly persons to assemble at or continue in or upon his premises, or do, suffer, or permit any act in contravention of his licence, shall, upon conviction thereof before two justices, pay for the first offence a fine not exceeding 40s.; for the second offence a fine not exceeding 5*l*.; and for every subsequent offence a fine not exceeding 20*l*., or be subject to a forfeiture of his licence at the discretion of the justices before whom he shall be convicted; and in case of such forfeiture of his licence, such person shall be disqualified for the space of one year then next ensuing from obtaining a fresh licence, and such fresh licence, if obtained within the said year, shall be absolutely null and void to all intents and

purposes." It is submitted, that the facts proved warranted the conviction. In *Greig v. Bendeno* (1 E. B. & E. 133), it was held, that if the justice infers from prostitutes coming to a refreshment-house, that they in fact met for purposes of prostitution or other disorderly conduct, he should, whether there has been disorderly conduct or not, convict. And in *Parker v. Green* (5 L. T. Rep. N. S. 46; 31 L. J. 133, M. C.), it being found by the magistrate that twenty-four prostitutes and fifty men remained at the bar of a public-house for an hour or more, that the women were disorderly, and some of them swearing, that at a later hour the same evening fifty prostitutes and sixty men were there, some of the prostitutes being the same as were there at the earlier part of the evening; that several of the same prostitutes were proved to have been in the same house on other evenings, and that the defendant was present on these occasions, it was held that this was sufficient evidence of knowingly permitting and suffering persons of notoriously bad character to assemble and meet together in the house contrary to excise licence granted under 9 Geo. 4, c. 61. On the other side it will be urged that there was no indecency, drunkenness, or disorder; but these, according to *Greig v. Bendeno*, are not necessary ingredients to the offence.

Huddleston (*Giffard* with him) for the appellant.—The facts are not sufficient to render the appellant liable. Sect. 32 is, "shall knowingly suffer prostitutes, thieves, or drunken or disorderly persons to assemble at or continue in or upon his premises, or do or permit any act in contravention of his licence." Now, the form of the licence does not specify anything about prostitutes. The keeper of a refreshment-house is not to exclude prostitutes so long as good order is maintained by them. [WIGHTMAN, J.—Not when they come for the purpose of refreshment merely.] The magistrate does not say that the appellant knowingly suffered the prostitutes to assemble in furtherance of prostitution. It is no licence to provide refreshments for known prostitutes. It is not found that the prostitutes were plying their trade there. [WIGHTMAN, J.—The magistrate means that.]

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This, also, was a case stated by one of the police Magistrates of the metropolis for the opinion of this Court, and which raised the question, whether the appellant had been rightly convicted of knowingly suffering prostitutes to assemble and continue upon his premises at a refreshment-room, No. 8, Leicester-square, known as "Kate Hamilton's."

The case stated that "the defendant had for some time kept his house open, under a refreshment licence, and that on the morning of the 19th April it was so kept open between the hours of 12 a.m. and 4 a.m.; that the police visited the house from half-

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hour to half-hour, within the limits of time named; that upon each occasion they found numbers of known prostitutes assembled in a public room in the said house; that the largest number on any of the visits so made by the police were ninety-five women, nearly all of whom were known to be prostitutes; that no signs of refreshment, saving a few soda-water bottles and coffee-cups were forthcoming on any occasion; that the prostitutes were all apparently belonging to the upper class of prostitutes; that the especial attention of the defendant was called to the fact that the women present during the visits of the police were prostitutes, and he admitted his knowledge of the fact; that many of the prostitutes seen by the police in the said public room were the same who had been seen on the occasion of their former visits during the said morning; that about equal numbers of men and prostitutes were present in the said house during the said morning; that the police were in many instances kept waiting while a bell was rung, and that an interval of about two minutes elapsed before they were admitted into the said public room, and that no evidence was produced to show that any refreshment was served in a *bonâ fide* way throughout the night.

"On the other hand, I do not find any evidence of drunkenness, indecency, or impropriety of conduct in the persons present at said house on said day.

"On this evidence I found the said prostitutes assembled, and in some instances, continued on the premises of said defendant, in furtherance of prostitution, and I convicted the defendant in the penalty of 60s., it being his second offence.

"The question for the opinion of the Court is, whether, upon finding these facts, the conviction was right in point of law.

"A. A. KNOX."

Pigott, Serjt., for the appellant. — There is no evidence that the appellant knew that the prostitutes were there for the purposes of prostitution. It must be found that he knowingly allowed prostitutes to use his house as a house of call or plying place as it were. The word "assemble" implies being there for a like purpose.

Field, who appeared for the conviction in this case also, was not called upon.

WIGHTMAN, J.—The question in both these cases is, not whether the magistrate was bound to convict on the facts and circumstances proved before him, but whether he might convict, and whether such circumstances and facts warranted him in so doing. The case is different in that respect from *Greig v. Bendeno*, where the question for the Court was, whether on certain facts the magistrate was bound to convict. Lord Campbell there said: "It is not necessary, in order to bring a case within the Act, that there should be actual disorderly conduct. The object was to prevent it as well as to suppress it, and the keeper of the shop would be liable to punishment if he encouraged or tolerated an assembling which had such a purpose in view." And Erle, J.,

said: "If such women come together for the purpose of prostitution, or if thieves come together for their unlawful purpose, the magistrate has power to convict." And Crompton, J., said: "I quite agree that upon the facts found to be proved, the magistrate was not bound to convict. He was bound to see whether the evidence satisfied him that the women came together for the purpose of prostitution or disorderly conduct. It is a pure question of fact for him; he was bound to convict if he thought they came for that purpose; and to that extent, perhaps, I should be disposed to qualify what I understood my Lord to say." In that case the Court took the distinction, and held that the facts there were consistent with the parties being in the house for a lawful purpose, viz., for the purpose of refreshment merely. That seems to me to be the real point in the case. It is said that these unfortunate women must have refreshment—no one can doubt that—it would be mere cruelty to say that they were not entitled to obtain it; but the question in this case is, whether the appellant, under colour of keeping a refreshment-house, which was found to be a *bonâ fide* refreshment-house, was not really converting it into a house of call for prostitutes. It would be a great encouragement to prostitution if such houses as this were to be kept, and it were to be held that they were not within the Act. The terms of the Act are, "knowingly suffer prostitutes, &c., to assemble at or continue in or upon his premises." If this was a house where prostitutes habitually assembled, it was a question to be ascertained whether they met for the purpose of taking refreshment, or in furtherance of prostitution. In this case there was a large assemblage of prostitutes, and the landlord knew perfectly well that they were prostitutes; and from these and other circumstances proved before him, the magistrate drew the inference that the landlord knew that the object of the women coming there was in furtherance of prostitution. It was a question for him to decide, and he has so found it. He finds many facts, from the whole of which he was led to the conclusion that the defendant had committed an offence within the purview of the enactment. The question for this Court is, whether there was enough proved before the magistrate to warrant the conclusion to which he came. I think that there was sufficient in both cases.

CROMPTON, J.—The magistrate has no right to send any questions of fact to this Court to determine, but only questions of law, or to ask us whether the evidence is such that he might convict upon it. In this case the magistrate finds the facts, draws an inference from them, and says, "therefore I convict." His statement consists of two parts—first, of the facts which he found to be proved; and secondly, of the inference which he drew from them. Looking at the facts found by him, I think there was evidence in both cases on which, in point of law—we have nothing to do with the policy or hardship of the enactment—the magistrate could fairly draw the inference which he did, and that the appellants had therefore committed an offence within the Act.

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not* BLACKBURN, J.—I am of the same opinion, and think that the convictions ought to be affirmed. The magistrate has convicted the appellants of “knowingly suffering prostitutes to assemble at and continue in and upon his premises,” in the very words of the enactment. I do not think that the mere fact of the women being prostitutes, or of a number of persons being thieves, would be an assembling of prostitutes or thieves within the Act; but as soon as it appears that they come in their capacity of prostitutes or thieves, and meet there as such, it would be within the Act. It is not necessary that prostitution or some act of theft should be planned at the time; but if the assembling was a sort of thieves’ club, or as a house of call, that would be sufficient to bring the case within the Act. The object of the enactment was to prevent persons assembling in the capacity of prostitutes or thieves. The magistrate, in finding that the women assembled in furtherance of prostitution, has found more than I think he need to have found. It would have been sufficient if he had found that they had assembled in the capacity of prostitutes.

Convictions affirmed.

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CENTRAL CRIMINAL COURT.

April 7th, 1862.

(Before the RECORDER.)

REG. v. FAIRLIE. (a)

Taking a false oath before the Surrogate—Marriage licence.

An illegitimate child being filius nullius, an indictment charging the defendant with taking a false oath before a Surrogate, and alleging that G. E. was the natural and lawful father of E. E., and that his consent was necessary as such father, under the 4 Geo. 4, c. 76, cannot be sustained.

THE indictment was as follows:—

Central Criminal Court, } THE jurors for our Lady the Queen,
to wit. } upon their oath present, that heretofore to wit, on the 4th day of January, A.D. 1862, at Doctors' Commons, in the City of London, in the province of Canterbury, and within the jurisdiction of the Central Criminal Court, one Travers Twiss was Vicar-General of the Archbishop of Canterbury, having authority to grant licences for marriages in the said province.

And the jurors aforesaid, upon their oath aforesaid, do further present that, on the said 4th day of January, and long before, it was by law required that when either of the parties to any intended marriage were under the age of twenty-one years, such party to such intended marriage not being a widower or widow, one of the parties to such marriage should personally swear before the Surrogate or other person having authority to grant licences for marriage, that the consent of the person or persons whose consent to such marriage is and was then required under the provisions of an Act of Parliament made and passed in a session of Parliament holden in the fourth year of his late Majesty King George the Fourth, intituled "An Act for amending the Laws respecting the Solemnization of Marriages in England," had been obtained thereto.

(a) Reported by ROBERT OBRIDGE, Esq., Barrister-at-Law.

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And the jurors aforesaid, upon their oath aforesaid, do further present, that William Robinson was, on the said day and year, at Doctors' Commons aforesaid, in the said city and province, and within the jurisdiction of the said court, a Surrogate having sufficient power and competent authority to administer an oath to any person applying or intending to apply for a licence for marriage within the said province.

Now the jurors aforesaid, upon their oath aforesaid, do further present that one Robert Francis Fairlie, contriving and intending to procure a marriage, to be solemnized between himself and one Eliza Ann England, she being then, and still, under the age of twenty-one years, and not being then, or since, a widow, without the consent of the lawful and natural father of the said Eliza Ann England, to wit, without the consent of George England, he being then and still alive, and being the person whose consent was by law required before the said Vicar-General was entitled to grant a licence for the solemnization of the said marriage, and contriving and intending to deceive the said Vicar-General, and to procure from the said Vicar-General a licence, for the marriage of himself, the said Robert Francis Fairlie, with the said Eliza Ann England, contrary to the provisions of the said hereinbefore recited act of Parliament, on the said 4th day of January, in the said year, at Doctors' Commons aforesaid, in the said city and province, and within the jurisdiction of the said Central Criminal Court, did personally come and appear before the said William Robinson, then being such Surrogate as aforesaid, and was in due manner sworn and took his corporeal oath upon the Holy Gospel of God, he, the said William Robinson, then being such Surrogate as aforesaid then having full and sufficient power and authority to administer the said oath to the said Robert Francis Fairlie in the behalf.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Francis Fairlie, being sworn as aforesaid before the said William Robinson, as such Surrogate aforesaid, he the said William Robinson, then and there having lawful and competent power and authority as such Surrogate to administer the said oath to the said Robert Francis Fairlie in the behalf, did, for the purpose of thereby obtaining a licence for the marriage of himself, the said Robert Francis Fairlie, with the said Eliza Ann England, who was then and there a minor, and under the age of twenty-one years, to wit, of the age of eighteen years and was not then or since a widow, falsely, corruptly, knowingly wilfully, fraudulently, and unlawfully then and there did swear among other things, in substance, and to the effect following, that is to say, that George England, the natural and lawful father of the said minor, thereby meaning the said Eliza Ann England, is consenting, thereby meaning that the said George England was then consenting to her marriage, thereby meaning that the said George England was then consenting to the marriage of the said Eliza Ann England with the said Robert Francis Fairlie, whereas, in truth and

in fact, the said George England, the natural and lawful father of the said Eliza Ann England, was not then consenting, nor at any time had been consenting, to the marriage of the said Eliza Ann England with the said Robert Francis Fairlie, as he, the said Robert Francis Fairlie, at the time he so swore as aforesaid well knew.

And the jurors aforesaid, upon their oath aforesaid, do further present that by means of the said false oath, so falsely, corruptly, wilfully, knowingly, fraudulently, and unlawfully taken by the said Robert Francis Fairlie as aforesaid, the said Robert Francis Fairlie did, at Doctors' Commons aforesaid, in the said city and province, on the day and year aforesaid, unlawfully, knowingly, wilfully, and corruptly obtain from the said Vicar-General of the said Archbishop of Canterbury a licence for the solemnization of marriage, at the parish of St. Mary, Lambeth, in the said province of Canterbury, and within the jurisdiction of the said Central Criminal Court, between him, the said Robert Francis Fairlie and the said Eliza Ann England.

And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the 5th day of January in the said year, at the parish of St. Mary, Lambeth, aforesaid, in the said province, and within the jurisdiction of the said Central Criminal Court, and by means of the said licence so unlawfully, corruptly, and knowingly obtained as aforesaid, he, the said Robert Francis Fairlie, procured the said marriage to be solemnized, and the said marriage was then and there solemnized between himself, the said Robert Francis Fairlie and the said Eliza Ann England, to the evil example of all others in like case offending against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

This was an indictment for taking a false oath before the Surrogate by the defendant, who, on the 4th of January, 1862, appeared before him, and made an affidavit, in accordance with the provisions of 4 Geo. 4, c. 76, s. 14.

Hardinge Giffard (Poland with him) for the prosecution.

Ballantine, Serjt. (*F. H. Lewis* with him) for the defendant.

It appeared by the evidence that the licence having been procured, the marriage was solemnized on the 5th January, and without the consent of George England, who was stated to be the lawful and natural father of the young lady.

George England stated, in his examination, that he was the father of Eliza Ann England, and he had not, directly or indirectly, given the defendant reason to believe that he consented to his marriage with his said daughter, who was at the time defendant married her under the age of twenty-one, on the contrary, he had refused such consent. Notwithstanding this, defendant went before a Surrogate, and there made the affidavit required by the Act 4 Geo. 4, c. 76, s. 14, which provides that "for avoiding all fraud and collusion in obtaining licences for marriage, that before any such licence be

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granted, *one of the parties shall personally swear, before the Surrogate or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or any other lawful cause, nor any suit commenced in any Ecclesiastical Court, to bar or hinder the proceedings of the said matrimony according to the tenor of the said licence, and that one of the parties hath, for the space of fifteen days immediately preceeding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized and where either of the parties, not being a widower or widow, shall under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this Act, has been obtained thereto: Provided always, that if there shall be no such person or persons having authority to give such consent, then, upon oath made to that effect by the party requiring such licence, it shall be lawful to grant such licence, notwithstanding the want of any such consent.*"

The 16th section of the same Act goes on to say that, "The father, if living, of any party under twenty-one years of age, such parties not being a widower or widow, or if the father shall be dead the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians then the mother of such party, if unmarried; and if there shall be no mother unmarried then the guardian or guardians of the person appointed by the Court of Chancery, any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be a person authorized to give such consent."

It also appeared, upon cross-examination of the father, George England, that at the time this daughter was born the mother was living with him as his wife, but he was not married to her, he having a wife then living, and from whom he had separated, and that upon the death of his wife, some six or seven years since, he married the person with whom he had been living, and the mother of this child, upon these facts,

Ballantine, Serjt.—I submit the case has failed. The oath must be false as to something which is material, and the statement here alleged to be false, viz., the consent of George England, the lawful and natural father of the said Eliza Ann England, was wholly immaterial, his consent was not required. If any consent at all were required it would be the mother's. Who is the father? Suppose in point of law the prosecutor is not the father, it is not disproved that the defendant had the father's consent.

The RECORDER.—The affidavit states, "by and with the consent of George England." It is necessary, when the person is under age, that the affidavit shall state that the consent of the person whose consent is required under the provision of the Act has been obtained; and sect. 16 says if the father be dead then the guardian or guardians and if no guardian the mother is to give

consent. There seems to be no provision for such a case as this, the child being illegitimate.

Ballantine, Serjt.—The defendant is here indicted for alleging the consent of a person who has in law no power to assent. He might perhaps have sworn, and truly, that there was no one entitled to give consent, and certain circumstances, as if the father of minor be *non compos mentis*, or if the guardians or mother be *non compos mentis*, or beyond the seas, or shall unreasonably or from undue motives withhold his or their consent, are provided for by the 7th section of the act; but the probability of such a case as this arising seems never to have been contemplated by the Legislature.

Giffard (*Poland* with him).—The Act of Parliament means the natural father and mother. The licence was undoubtedly issued in pursuance of the defendant's statement, that he had the father's consent, and he adds to it a statement, which it is now contended was in point of law not only incorrect but immaterial. He chooses to swear before the Surrogate that "George England, the natural and lawful father of the said minor, was then consenting to her marriage;" and how can that be said to be immaterial when, but for such statement on oath, the licence could not have been obtained. *Reg. v. Philpott* (5 Cox Crim. Cas. 363) is a case in point, and there, on a trial of ejectment, where it was material to prove whether A. had died before B., the defendant produced what purported to be a copy of A.'s will, and falsely swore that he had examined it with the original will in the registry at L., and also that he had examined a memorandum, at the foot of the copy of the will, with the entry in a book called the Act Book in the same registry. On an objection to the admissibility of this evidence it was withdrawn; but upon the defendant being convicted of perjury in regard to the above evidence the judges held, that even although the will was irrelevant, the circumstances that the evidence was inadmissible and subsequently withdrawn did not affect the question of perjury, as it could not purge the false swearing. The defendant had thought proper to make a matter material, and, by means of a false oath, endeavoured to have a document in support of that received in evidence.

The RECORDER.—Direct your attention to the form of your indictment. You allege that George England was the natural and lawful father of the said, &c., he being the person *whose consent was by law required before* the said Vicar-General was entitled to grant a licence.

Giffard.—That, I apprehend, is the same point. If it be immaterial to allege this for this purpose it may be rejected. The jury may reject that portion of the indictment, and then it would stand that the defendant had falsely sworn that George England had consented.

Ballantine, Serjt. (in reply).—The indictment alleges the absence of consent of the person whom the Act of Parliament says alone can give consent, viz., the natural and lawful father. If the

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father had been present and had given his consent it would have been a consent within the meaning of the Act 4 Geo. 4. It is clear that that Act refers to a strictly legal connexion, and does not contemplate the question of a false relation to a bastard child. The child, until the marriage with the mother, follows the settlement of the mother, and if that mother afterwards marry the father, the father of such child has no claim upon her duty or obedience, nor need she obtain his permission to allow of her doing such an act as marriage.

The RECORDER (after consulting with the Common Serjeant) —I think the charge here is not established. The indictment alleges that George England was the natural and lawful father of Eliza Ann England, who was a minor, and that as such fatherhood was rendered necessary by a certain Act of Parliament for a son intending to marry her to depose on oath before a Justice that he had obtained the consent of her lawful and natural father. The defendant made an affidavit stating that he had obtained the consent, but the evidence has proved that George England was not the natural and lawful father, and that he was not a person whose consent was by law required. The indictment alleges that a licence could be granted by the Vicar-General, in the case of a minor, it was necessary to have the consent of the said father. England, he being her natural and lawful father. The evidence shows that Eliza Ann England had no natural and lawful father, and it is my duty to say that in law the evidence does not establish the charge.

Not guilty.

COURT OF QUEEN'S BENCH.

November 3, 1862.

(Before COCKBURN, C.J., WIGHTMAN, BLACKBURN, and
MELLOR, JJ.)

REG. v. BRAY. (a)

*Vexatious Indictments Act—Consent of Judge to the indictment being preferred—22 & 23 Vict. c. 17, s. 1.**An application was made, a fortnight after the trial, to a Judge of one of the Superior Courts, for his consent in writing, to an indictment being preferred for perjury against a witness on a trial before him; and the only material laid before him in support of the application was a newspaper report of the trial, beneath which he wrote, "I consent to a prosecution in this case," and signed his name:**Held, a sufficient consent within the 22 & 23 Vict. c. 17, s. 1.*

THIS was an application for a rule *nisi* for a *certiorari* to remove an indictment preferred by Messrs. Waterlow and Co. against the defendant for perjury, and found at the Central Criminal Court in September last, into this Court, with a view to its being quashed for want of jurisdiction. The matter had been before Mellor, J., at Chambers, who had ordered a stay of proceedings, that the defendant might have an opportunity of making this application. The perjury assigned was alleged to have been committed in an action for a malicious prosecution, tried in this Court before Mellor, J., in which the accused was the plaintiff and a witness on his own behalf. It was now admitted that there was a *primâ facie* reasonable ground for the charge of perjury, but no application was made to the learned Judge at the time of the trial for any order, nor was any order then made by him to indict the now defendant for perjury. A fortnight after the trial an application was made for the consent of Mellor, J., to such an indictment, in pursuance of the Vexatious Indictments Act, 22 & 23 Vict. c. 17, s. 1, and the only material in support of the application was a copy of the report of the trial of the action, cut out from the *Times* newspaper, and pasted on a piece of blank paper; and the learned Judge wrote on the paper, "I consent to a prosecution in this case, J. Mellor."

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Woollett (*Ingersant* with him), in support of the application. The facts should have been brought before the learned Judge Chambers on affidavit.

MELLOR, J.—The newspaper report affixed to the paper was merely to refresh my memory; and the facts being fresh in my mind, I gave my consent to the prosecution in the form stated.

Woollett.—It is contended that this was not a sufficient consent to satisfy the statute 22 & 23 Vict. c. 17, s. 1, which enacts that no bill of indictment for perjury (among other offences) shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, &c., or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction, with the consent in writing of a Judge of one of the Superior Courts of law at Westminster, or of Her Majesty's Attorney-General or Solicitor-General of England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a Judge of one of the Superior Courts of law in Dublin or of Her Majesty's Attorney-General or Solicitor-General for Ireland, or in the case of an indictment for perjury by the direction of any Court, Judge, or public functionary authorized by the 14 & 15 Vict. c. 100, to direct prosecution for perjury, &c. In this case the charge had not been made before a magistrate, nor was the prosecutor bound by recognisance to prosecute. Notice should have been given to the defendant of the application to the learned Judge, which should have been supported by affidavits.

COCKBURN, C. J.—It has often happened that learned Judges have taken upon themselves to direct prosecutions where perjury has been committed before them, but they have never called upon the parties accused to say why that should not be done. Then why should they give notice to parties because the consent is required to be given in writing? Where the application for such consent is made to a Judge who did not try the cause, I can understand why that learned Judge, in the exercise of his discretion might require notice to be given to the other side. But where the application is made to the Judge who tried the cause, and who is in possession of all the facts, I can see no difference between such a case and where the Judge directs a prosecution at the time of the trial.

Woollett.—The learned Judge could not take judicial notice of newspaper report. After the determination of a trial, the Judge who tried the cause has no more judicial knowledge of the facts than a stranger, and they should be brought before him on affidavit. *Reg. v. Allen* (1 Best & Smith, 857), was referred to. Next the latter part of the section is restrictive, and the Judge

who tried the cause in which perjury is alleged to have been committed must give consent for the prosecution at the time of the trial, according to the 14 & 15 Vict. c. 100.

COCKBURN, C. J.—We are of opinion that there are no grounds for this application. The object of the statute was to prevent an abuse, very rife at one time, of preferring indictments from vexatious and corrupt motives. In abridging the right of preferring indictments the statute imposed certain conditions, one of which is the obtaining the consent of a Judge of one of the Superior Courts, but as to the circumstances under which such consent may be obtained, that is left to the discretion of the learned Judge, and it is not for this Court to interfere with such discretion. In this case the application for such consent was made to the learned Judge, who tried the cause and who was in full possession of the facts, and who had exercised his discretion in the matter. The statute prescribes no form in which the consent in writing is to be made, and it is only necessary that there should be sufficient to identify the cause. Here the consent was given in writing and was attached to a paper which identified the cause.

WIGHTMAN, J.—I am of the same opinion.

BLACKBURN, J.—As a matter of discretion and of practice in these cases I have refused to interfere, directing the parties to go before a magistrate, where the depositions of the witnesses would be taken. When the parties have been before a magistrate, and the evidence of the witnesses has been taken, and the accused has been committed upon a specific charge, and it is required to insert counts for other offences in the indictment, and I have found the evidence such as to give fair warning to the accused of the charges sought to be included in the indictment, I never doubted, when the Judge was satisfied on that point, that he was bound to give his consent in writing, and that it was not necessary to grant a summons to the accused to show cause why that should not be done. But in the present case the application was made to a Judge who was in full possession of the facts, and, for the reason stated, I am of opinion that his consent was properly given.

MELLOR, J.—I am of the same opinion.

Rule refused.

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CENTRAL CRIMINAL COURT.

November 24th, 1862.

(Before the RECORDER.)

REG. v. BRAY. (a)

*Perjury—Indictment.**An indictment alleged that the cause "came on to be heard and was duly tried by a jury."**Held, sufficient, although no verdict given, the trial ending in a nonsuit***T**HE defendant was indicted for perjury committed at a trial *nisi prius*, before Mellor, J.*Parry, Serjt. (Metcalf with him) for the prosecution.**Ballantine, Serjt. (Wollett with him) for the prisoner.*

The parts of the indictment material to this case were follows:—

"The jurors for our Lady the Queen upon their oath present that before committing the offence hereinafter mentioned, to-wit, on the 27th June, A.D. 1862, at the sittings of *nisi prius*, holden after Trinity Term at Westminster Hall, in and for the county of Middlesex, before Sir J. Mellor, Knight, one of &c., &c., in the absence and place of the Right Honourable Sir A. J. E. Cockburn Bart., Chief Justice of the same court, a certain action then depending in the same court, between William Bayley Bray, the plaintiff, and Alfred James Waterlow and others, as defendants, came on to be tried in due form of law, and the said action was then, to wit, on the day and year aforesaid, *duly tried by a jury of the country in that behalf duly sworn*. And the jurors aforesaid on their oath aforesaid, do further present that upon the said trial of the said action it became and was material, &c., &c. And the jurors aforesaid upon their oath aforesaid, do further present that on the day and year aforesaid, and within the jurisdiction of the Central Criminal Court, &c., &c., the said William Bayley Bray was then duly sworn and took his corporeal oath, &c. and upon his oath aforesaid, being so sworn as aforesaid, falsely, corruptly, wilfully, and maliciously did depose and swear in substance and effect as follows, &c., &c. And so the jury aforesaid &c. &c."

At the close of the case for the prosecution,

Ballantine, Serjt.—I submit this indictment is bad. It alleges

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

that the cause was "*duly tried*," whereas it appears by the evidence the trial was incomplete, inasmuch as it ended in a nonsuit. A trial cannot be said to be complete until a verdict is given. The jurors are sworn to "*well and truly try, and a true verdict give*." Although, in some points, the rules, as regards proceedings in a trial at *nisi prius*, are not identical with those observed in the criminal courts, there may be an analogy, and I may instance the case of a trial in a criminal matter where a juror is taken ill, and the jury is discharged from giving a verdict. In that case there has been no trial; it is the commencement of a trial that is not concluded, and twelve jurors are again sworn, and the trial commences *de novo*. "*Duly tried by a jury of the country*" means brought to a conclusion by a verdict delivered by that jury.

The RECORDER.—You say a trial is not complete without a verdict?

Parry, Serjt.—The averment is in accordance with what appears by the record. The record states that "afterwards, to wit, on the 27th day of June, A. D. 1862, at Westminster, in the county of Middlesex, before the Honourable Sir John Mellor, Knight, one of Her Majesty's Judges, &c., come the parties within named, by their respective attorneys within named, and a special jury of the within named county, being summoned, also come, who, being sworn to try the matters in question between the said parties, after evidence being given to them, thereupon withdrew from the bar, there to consider of the verdict to be by them given upon the premises, and after they had considered thereof, and agreed amongst themselves, they returned to the bar here to give their verdict upon the premises, whereupon the plaintiff, being solemnly called, comes not, nor does he further prosecute his suit. Therefore, &c." By this it appears, as far as the jury were concerned, the cause was by them duly tried, and the form of oath, to which attention has been called, is, "*truly try and a true verdict give*." They may try and yet not give a verdict.

The RECORDER.—Suppose a case where the plaintiff is nonsuited upon counsel's opening, would that be a trial?

Parry, Serjt.—Yes: the moment they are sworn in the case there is a trial. In this case evidence was given, and the jury considered their verdict, and the plaintiff, not caring to risk a verdict at their hands, withdraws from his suit. The case was, by the jury, duly tried.

Metcalf followed, on the same side.

The RECORDER.—I am of opinion the indictment is good, but, if it should become necessary, I will take the opinion of the Judges when they arrive.

The jury, having found the prisoner guilty, sentence was respited, but, ultimately, the learned Recorder having consulted the Judges, Mr. Baron Bramwell and Mr. Justice Byles, stated he was confirmed in the view he had taken in the first instance, and should hold the indictment to be good.

Sentence—*Twelve months imprisonment, &c.*

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COURT OF CRIMINAL APPEAL.

November 15, 1862.(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. PEEL. (a)

Quarter Sessions—Jurisdiction—Larceny upon the high seas.

A Court of Quarter Sessions has, by the 24 & 25 Vict. c. 96, s. 11 jurisdiction over the offence of larceny when committed upon the high seas, if the offender is apprehended within the jurisdiction of the Court of Quarter Sessions, as, e. g., where the offender and prosecutor were both fellow-passengers in a vessel, and the larceny was committed on the high seas, between Madras and Point de Galle, and the offender was apprehended at Southampton and tried at the Southampton borough Quarter Sessions.

CASE reserved for the opinion of this Court by the Recorder of Southampton (Hants).

The prisoner was tried before me at the Quarter Sessions for the borough of Southampton and county of the town of Southampton, holden by me on the 20th October last, on two indictments, in which he was charged with having stolen, on the 14th September last, certain watches and moneys, the property of John James Tyler, and certain handkerchiefs, the property of Robert Lee.

The prisoner and the prosecutors were fellow-passengers on board a British steam-vessel, the *Candia*, which, on the 14th September, was on the high seas between Madras and Point de Galle.

The articles alleged to have been stolen were taken by the prisoner from the cabins of the prosecutors while the *Candia* was on the high seas.

The prisoner was apprehended within the borough and county of the town of Southampton.

The prisoner pleaded guilty to both indictments, and was thereupon sentenced to three calendar months' imprisonment with hard labour, on each of the charges, under which sentences

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

he is now in custody; but as I doubted whether a Court of Quarter Sessions could have any jurisdiction over larcenies committed on the high seas, I reserved a case for the opinion of the Court of Appeal.

It was contended, on behalf of the prosecution, that the 115th section of the 24 & 25 Vict. c. 96, gave jurisdiction to any Court of Quarter Sessions in cases of larceny, &c., committed on the high seas, if the offender had been apprehended within the jurisdiction of that Court of Quarter Sessions.

I request the opinion of the Court of Criminal Appeal, whether or not I had jurisdiction under the above section to try the prisoner for the offences alleged against him in the indictments, he having been apprehended within the jurisdiction of the borough and county of the town of Southampton, of which I am Recorder.

MONTAGUE BERE.

The 24 & 25 Vict. c. 96 (Larceny, &c., Act), sect. 115, enacts that, "All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in which the offender shall be apprehended or be in custody, and in any indictment for any such offence or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed on the high seas: provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces."

No counsel appeared on either side.

POLLOCK, C. B.—In this case, in which the prisoner committed the larcenies charged while in a vessel upon the high seas, we are of opinion that the conviction was right. The statute gives Courts of Quarter Sessions jurisdiction over the offences mentioned in the Act, which would otherwise not have been triable at Quarter Sessions, if the prisoner is apprehended within the jurisdiction. Here it appears that the prisoner was apprehended within the jurisdiction of the Court of Quarter Sessions at which he was tried.

The rest of the Court concurring,

Conviction affirmed.

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PEEL.
—
1862.

Quarter
Sessions—
Jurisdiction.

COURT OF CRIMINAL APPEAL.

November 15, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. HAMILTON THOMPSON. (a)

False pretences—Larceny.

*It was the duty of the prisoner, a clerk, to pay dock dues upon goods exported by his master, and upon ascertaining the amount required upon each day's export before paying it, to obtain the sum from the master's cash-keeper. The prisoner, knowing that 1l. 3s. only was due on a certain day, fraudulently represented to the cash-keeper that a larger sum was due, and having obtained that he paid the 1l. 3s. only, and appropriated the difference to his own use :
Held, that although the evidence would have been sufficient to support an indictment for false pretences, he was not guilty of larceny.*

CASE reserved by the Recorder of Liverpool.

At the Court of Quarter Sessions of the Peace, holden in and for the borough of Liverpool, on the 14th September, 1862, Hamilton Thompson was tried before me upon an indictment containing three counts, charging him, that he, being servant of one Edward Evans and others, did feloniously steal three separate sums of money, their property.

The prosecutors were wholesale druggists, carrying on business at Liverpool, and were in the habit of exporting drugs to customers and consignees abroad.

The prisoner was their clerk and servant. It was a portion of his duty to pay dock and town dues which might be due upon goods exported by the prosecutors.

Upon ascertaining the amount required for that purpose upon each day's export, it was his duty, before paying it, to apply for it and obtain it from the prosecutor's cash-keeper, and, having obtained it, to pay it over.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

It was proved under the first count, that on the 21st August, 1862, there was required to pay dock and town dues upon goods exported by the prosecutors the sum of 1*l.* 3*s.*, and no more was paid by the prisoner on behalf of the prosecutors for such dock and town dues. It was also proved that upon that day the prisoner, knowing that 1*l.* 3*s.* and no more was really due, fraudulently represented to the cash-keeper of the prosecutors that 3*l.* 10*s.* 4*d.* was really due from the prosecutors for such dock and town dues, and that he fraudulently obtained the sum of 3*l.* 10*s.* 4*d.* from the said cash-keeper by such representation, intending at the time he so obtained it to appropriate the difference to his own use, and defraud his masters of the same, and it was proved that he did so appropriate such difference, being the sum of 2*l.* 7*s.* 4*d.*

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—
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—
False pretences
—Larceny.

The second and third counts were supported by similar proof.

It was submitted by the counsel for the prisoner that the above evidence did not disclose a case of felony, and that if the prisoner had committed any offence in law it was that of obtaining money by false pretences, and in support of this view he cited *Reg. v. Joseph Barnes* (2 Den. C. C. 59; 5 Cox Crim. Cas. 112; 20 L. J. 34, M. C.). (a)

I was of opinion that the facts in *Reg. v. Barnes* were distinguishable from the facts in this case, inasmuch as there the money was delivered to the prisoner with the intent of parting with it wholly to him in repayment of sums supposed to have been already disbursed by him on account of his employers; while here it was delivered to him to be disbursed in future on account of his employers, so that the property in the money was not parted with by the prosecutors, but the possession only, and I thought that the prisoner might be found guilty of felony.

The jury found the prisoner guilty, and I respited judgment and remanded the prisoner back to the Liverpool borough gaol, reserving the question whether the prisoner on the foregoing state of facts was properly found guilty of felony.

Little, for the prisoner.—The facts of this case are not distinguishable from those in *Reg. v. Barnes*. That case entirely followed *Mitchell's* case (2 East, P. C. 830), where it was held, that, although the prisoner might have been convicted for false pretences, a conviction for larceny could not be sustained. [WILLIAMS, J.—The difficulty is to lay one's finger upon any particular coin stolen by the prisoner, because he was paid in the lump, and was justly entitled to a part of what he received.] So, in *Reg. v. Essex* (Dears. & B. 371; 7 Cox Crim. Cas. 384), the same principle was acted upon.

(a) *Reg. v. Barnes* decided that A., who was employed to make purchases on account of his masters, having fraudulently represented to B., a fellow-servant, that he had bought goods for his masters and paid for them, B. having authority to pay out of the masters' money all such demands as A. should make upon them in respect of such purchases; and having, thereby obtained from B. a sum of money the property of his masters, was not guilty of larceny, but of false pretences.

REG. *Leofric Temple*, contra.—The prisoner could not have been
 v. indicted for false pretences, for the pretence was of doing some-
 THOMPSON. thing *in futuro*. [MELLOR, J.—The prisoner might have been
 1862. indicted for pretending that more was due than really was; that
 ——— a misrepresentation of a fact.] The prisoner undertook to disburse
False pretences the money for the prosecutors *in futuro*. [POLLOCK, C. B.—No
 —Larceny. doubt there was a misrepresentation of something to be done
 by-and-by, but there was also a misrepresentation of an existing
 fact. WIGHTMAN, J.—Then there is the question suggested by
 my brother Williams—how is the particular coin to be distin-
 guished?] This is like *Reg. v. Robins* (1 Dear. C. C. 418; 6 Co-
 Crim. Cas. 420), where one servant was induced, by false repre-
 sentation, to part with goods to another servant, who appropriated
 them; and this was held to be larceny.

POLLOCK, C. B.—No doubt this prisoner obtained the money
 by false pretences, but we are of opinion it was not larceny.

Conviction quashed..

COURT OF CRIMINAL APPEAL.

November 15, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG v. DEER. (a)

*Felonious receiving—Property of husband found in possession of man
living with prosecutor's wife—Evidence.*

The prisoner lodged at the prosecutor's house about a year, and then left, ~~but~~ at what time and in what manner did not appear. On the next day the prosecutor's wife left with a small bundle. The articles mentioned in the indictment were then missed by the prosecutor, and were of too great bulk to have been contained in the bundle taken by the wife. Two days afterwards the prisoner was apprehended in company with the prosecutor's wife on board a vessel bound for Quebec, the wife passing by the prisoner's name; and the missing articles being found part in the prisoner's cabin, and some on his person: *Held*, that the prisoner could properly be convicted upon this evidence of feloniously receiving the articles, well knowing the same to have been feloniously stolen by a certain evil-disposed person.

CASE reserved by the Chairman of the Glamorganshire Quarter Sessions.

Edmund Deer was indicted and tried before me at the last Midsummer Quarter Sessions for the county of Glamorgan.

The following is a copy of the indictment:—

"Glamorganshire to wit.—The jurors for our Lady the Queen, upon their oath present that Edmund Deer, late of Mountain Ash, in the parish of Aberdare, in the county of Glamorgan, railway policeman, at the parish aforesaid, in the county aforesaid, on the 8th day of April, 1862, feloniously did steal, take and carry away one purse and 10*l.* of money, one pair of sheets, one pair of blankets, one feather pillow, two pieces of flannel, one alpaca gown, two cashmere shawls, one cotton shirt, one stuff gown, one pair of scissors, two towels, one bolster-case, two knives, two forks, two spoons, three and a-half yards of black cloth, one piece

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of pilot cloth, one diaper table cloth, one clothes brush, one pilot-cloth coat, one square, one hammer, two gimlets, one pair of compasses, one spokeshave, one gouge, one file, and one bradawl, of the goods and chattels of William Bartlett, against the peace of our Lady the Queen, her Crown and dignity.

“And the jurors aforesaid, upon their oath aforesaid, present, that the said Edmund Deer, on the day and date aforesaid, feloniously did receive one purse and 10*l.* of money, one pair of sheets, one pair of blankets, one feather pillow, one piece of flannel, one alpaca gown, two cashmere shawls, one cotton shirt, one stuff gown, one pair of scissors, two towels, one bolster-case, two knives, two forks, two spoons, three and a-half yards of black cloth, one piece of pilot cloth, one diaper table cloth, one clothes brush, one razor, one pilot cloth coat, one square, one hammer, two gimlets, one pair of compasses, one spoke gouge, one file, one chisel, and one bradawl, of the goods and chattels of the said William Bartlett, then lately before the court, stolen, taken, and carried away by a certain evil-disposed person (he, the said Edmund Deer, then and there well known to be the said William Bartlett, then and there well known to have goods and chattels to have been feloniously stolen), in violation of the form of the statute in such case made and provided, against the peace of our Lady the Queen, her Crown and dignity.”

It appeared in evidence that the prisoner had lived in the house of the prosecutor, William Bartlett, as a lodger, for about a month up to the 8th April, 1862, on which day he left. The evidence as to the time or manner of his leaving. On the day Sarah Bartlett, the prosecutor's wife, left her home with her daughter, a girl of 15 years of age, accompanied by the prisoner. It proved that she left with only a small bundle under her arm. William Bartlett, on returning from his work on the same evening, found the different articles enumerated in the indictment.

On Thursday, 10th April, a policeman was sent to the house, and on Friday, 11th April, he apprehended the prisoner. The prisoner went off company with the prosecutor's wife, who was passing under the name of Mrs. Deer, on board the *Culloden*, in the river Mersey, bound for Quebec, for which place tickets in the name of Mr. Deer were found on the prisoner.

The whole of the property missed was found in the cabin and on his person, and was of a bulk and weight which could not have been comprised in the wife's bundle, and consisted of one purse, 10*l.* in money, one pair of sheets, one pair of blankets, one feather pillow, two pieces of flannel, one alpaca gown, two cashmere shawls, one cotton shirt, one stuff gown, one pair of scissors, two towels, one bolster-case, two knives, two forks, two spoons, three and a-half yards of black cloth, one piece of pilot cloth, one diaper table cloth, one clothes brush, one pilot cloth coat, one square, one hammer, two gimlets, one pair of compasses, one spokeshave, one gouge, one file, and one bradawl.

There was no further evidence as to who had taken the articles from Bartlett's house.

The jury found him guilty of receiving, knowing the goods to have been stolen; and the prisoner was thereupon sentenced to be imprisoned and kept to hard labour for six calendar months, and is now in prison.

After the jury had been discharged, upon the application of the counsel for the prisoner, I reserved for the consideration and decision of the Court of Criminal Appeal the question, whether such verdict could be sustained.

No counsel appeared on either side.

POLLOCK, C. B.—The facts in this case are, that the prisoner lodged in the house of the prosecutor, and that he disappeared, under circumstances not disclosed, shortly after the prosecutor's wife left, taking with her a small bundle. Then the prisoner was found with the property of the husband, some in his possession, and a part on his person. The husband's property was gone, and could not have been taken away by the wife, as her bundle could not have contained it, and the whole of it was shortly afterwards found in the prisoner's cabin and upon his person. The property was gone, and the reasonable supposition is that it was stolen. It was then found shortly after in possession of the prisoner. We think that there was evidence from which the jury might draw the inference which they have drawn, and that the conviction must be sustained.

Conviction affirmed.

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C.

DEER.

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receiving—
Evidence.*

COURT OF CRIMINAL APPEAL.

November 15, 1862.

Before POLLOCK, C.B., WIGHTMAN and WILLIAMS,
CHANNELL, B., and MELLOR, J.)

REG. v. ISAACS. (a)

Malicious injury to person—Supplying noxious thing to procure a carriage—Intent.

Under the 24 & 25 Vict. c. 100, s. 59, the thing supplied with intent to procure the miscarriage of a woman with child must be noxious nature.

*Therefore, where the thing supplied and taken was of a harmless
 nature, but owing to the imagination of the woman being power,
 acted upon a miscarriage ensued, it was held a conviction could
 be sustained.*

CASE reserved by the Chairman of the Dorsetshire Quarter Sessions.

The prisoner, Louisa Isaacs, was tried before me at the Quarter Sessions for the county of Dorset, held on the 1st October, 1862, under the 24 & 25 Vict. c. 100, s. 59, for 1st—she unlawfully did supply to one William Broadway a large quantity of a certain noxious thing to the jurors unknown to the jury, knowing that the same was intended to be unlawfully used by the jurors with intent to procure the miscarriage of one Emma Warner."

Enma Wardner, the prosecutrix, was at the time of the commission of the alleged offence, a single woman, in the service of Mr. William Smith, of Blandford, and whilst in such service, became, about the month of May last, in the family-way by 1234 William Broadway, of the same place.

On or about August 1st last, the prosecutrix, then being about three months gone with child, William Broadway, in consequence of what he had heard from some one of the prisoner, went to the prisoner's house in which she lived with her husband, and asked her husband was not present, and did not in any way interfere. He knew nothing that would bring on the regular trial.

Wm. H. Brown, Esq., Barrister-at-Law.

courses of Emma Wardner, the prosecutrix. The prisoner replied that she would try, as she had done for others, and then asked Broadway how long the courses had stopped. He said "for three months." The prisoner answered, "I will make that all right for her, if she will take the stuff I give you." The prisoner then gave Broadway three bottles and one half-pint bottle, all full of something of a dark colour, and at the same time stated, that the prosecutrix was to take a wine-glassfull of the stuff in the large bottles three times a day, and that she was to take the small bottle in two doses, about two days after she had begun the first bottle. "This," the prisoner added, "will make it all right for her in about eight or nine days. It will not hurt her." Whereupon Broadway took away the bottles, carried them to the prosecutrix, and informed her of the directions how to take the stuff contained in them, as given to him by the prisoner.

The prosecutrix accordingly, the same evening they were given to her, opened one of the large bottles, and drank a wine-glassfull of the stuff that came from it. She then went to bed. She felt dizzy in the head, and the next morning she felt stupid in the head. Becoming in consequence apprehensive that the stuff in the bottles would hurt her, she took no more.

The bottles, with their contents, were subsequently handed over to a Mr. Daniell, a surgeon of Blandford, to be analysed by him. On being so analysed, with the assistance of Dr. Ording, a considerable quantity of starch of some plant, and some woody fibre, was deposited. The liquid evaporated, and the gas escaped, and the result of the analysis was, that, in Mr. Daniell's judgment, the liquid in the bottles was some vegetable decoction of a harmless character, and such as would not procure a miscarriage. He added, that if taken with the belief that it would produce a miscarriage, it might, by acting on the imagination, produce that effect, although otherwise of a perfectly harmless character.

The above facts being proved, I left the case to the jury; and in doing so said that it seemed to be doubtful, upon the authorities, whether it was necessary that the thing supplied should be of a noxious character or not, and that the reported cases were conflicting on this subject. I then read to them the judgment of Vaughan, B., in *Coe's case* (6 C. & P. 403), where, referring to words similar to those employed in the statute above cited, he said: "It is with the intention the jury have to do, and if the prisoner administered a bit of bread merely, with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the Act of Parliament;" and I added, that a more recent case threw so much doubt on this point that I would not direct them positively on this head.

I did not give any direction as to whether the stuff above mentioned was, in my opinion, a noxious thing.

I read to the jury the words of the indictment, and told them to decide first on the intent (suggesting that the prisoner might have had no such intention, but used her reputation, such as it

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*Miscarriage—
Supplying
noxious thing.*

Rex.
"
1844/5.
—
1842.
—
Miscarriage—
Supplying
noxious thing.

was, as a means of making money), and, if necessary, then consider whether the evidence satisfied them that the stuff "noxious."

The jury found the prisoner guilty of the intent, and that thing was noxious; whereupon I forebore to pass judgment; the prisoner was discharged upon recognisance of bail to appear and receive judgment when called upon to do so.

And I now beg to ask the opinion of the Court whether upon the facts above set out, taken in conjunction with remarks in summing up, the prisoner was rightly convicted, to make such order as the justice of the case may require, stating whether both questions ought to have been left to jury.

PORTMAN, Chairman

No counsel appeared for the prisoner.

Fooks, for the prosecution.—This case was reserved for opinion of this Court, as to whether *Rex v. Coe* (6 C. & P. 4) is law since the recent Act. In that case the prisoner was indicted upon the second clause of the 9 Geo. 4, c. 31, s. 13, and the words were, "Any medicine or other thing."

WIGHTMAN, J.—To support this indictment it must appear in evidence that it was a noxious thing.

WILLIAMS, J.—The jury have found it was a noxious thing but the real question is, whether there was any evidence of being so.

WIGHTMAN, J.—Suppose it had been water merely, would that have sustained this charge?

Fooks.—The medical man, in reply to that question, said even water might produce abortion, if the imagination of a female were so acted upon as in this case.

POLLOCK, C. B.—Many years ago a person was tried for witchcraft. The Judge told the jury that the crime consisted in intention, and the jury found a verdict of guilty. The Court however, granted a pardon.

WILLIAMS, J.—The language of the statute (a) is, "knowing that the same is intended to be used with intent to procure miscarriage."

POLLOCK, C. B.—We are all of opinion that the thing intended by the statute must be noxious in its nature.

Conviction quashe

(a) 24 & 25 Vict. c. 100, s. 59: "Whosoever shall unlawfully supply or procure poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of a woman, whether she be or be not with child, shall be guilty of a misdemeanor, and convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

COURT OF CRIMINAL APPEAL.

*November 15, 1862..**(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL. B., and MELLOR, J.)*

REG. v. MEANY. (a)

*Practice—Verdict—Right of judge to direct a jury to reconsider.**A judge is not bound to record a verdict which does not amount to guilty or not guilty, unless the jury request him to record it.**Upon an indictment for false pretences, the jury found the prisoner guilty of obtaining the property by the false pretences alleged, but added, that they thought he meant to pay for it.**The judge refused to receive such verdict, and told them they must find the prisoner guilty or not guilty, and left the facts again for their consideration.**Held, that a verdict of guilty which they then found was sustainable.***T**HE following case was reserved at the Middlesex Sessions.

The prisoner was tried before me on the 8th October, 1862, for obtaining, by false pretences, of one person, a printed book of the value of 16s. 6d.; of another person, 6s. in money; and of another person, 10s. in money, and goods to the amount of 2l.

The false pretences consisted of the production, by the prisoner, of two forged letters, written on paper improperly obtained from the International Exhibition. The letters were alike in all respects except the date and the particular amount of money, and were represented by the prisoner to be genuine.

The earliest in date was as follows:—The Royal Arms were in the margin, and the heading was printed:

“International Exhibition, 1862.

“Her Majesty’s Commissioners, the Earl Granville, K.G.,
Chairman.”

The remainder was proved to be in the prisoner’s handwriting

“Exhibition Building,
“South Kensington, W.

“Aug. 11, 1862.

“Sir,—I am directed by H. M. Commissioners to say that your

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account for 45*l.* 10*s.* (advertising in *Lancashire Free Press*) shall be laid before the audit committee at its next meeting, on the 22nd inst., and should the amount be passed, a cheque shall be sent to this office for you at any time after twelve o'clock on Saturday 23rd. Meanwhile you are requested to send vouchers for the items charged as against Messrs. Kelk and Lucas.

"I am, Sir,

"Your obedient servant,

"J. H. HENDERSON, pro. J. J. MAYO.

"S. J. Meany, Esq."

The other letter was dated 21st August, and mentioned 42*l.* 10*s.* for advertisements in another paper.

One of these letters was shown to each of the three prosecutors, and they all stated that they parted with their property on the faith of the prisoner's assurances that they were genuine.

Mr. Mayo, the financial officer, and Mr. Street, of the advertising department, proved that the whole was a fiction, no such claims being in existence.

The prisoner, who had no counsel, addressed the jury at considerable length, and contended that it was a simple debt on one side and a simple credit on the other. He further stated that he intended to pay for the goods, but did not suggest any means by which he could do so.

The facts having been left to the jury, after some consideration the foreman said, "We find the prisoner guilty of obtaining the property by the false representations in the two forged letters, and that the parties would not have parted with it without those letters had been used; but we think that he meant to pay for them."

I refused to receive this as a verdict, and told the jury that they must find the prisoner guilty or not guilty, and that if in their opinion he had not a fraudulent intention, they must say it by a verdict of not guilty. I put before them the leading facts of the case, and told them that in addition to the making of the false representations and the obtaining of the goods by means of them they should consider whether at the time he so obtained them he had a fraudulent mind. I then read to them the words of the statute as follows, viz.: "On the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." I then specifically left it to them to say whether the prisoner did the acts charged with an intent to defraud.

After a short consultation they found the prisoner "Guilty."

Upon this it was suggested to the prisoner that he should require the Court to enter the first statement of the jury as a verdict of "Not Guilty," instead of the second of "Guilty."

I declined to accede to this suggestion, and was preparing to

pass sentence, when one of the magistrates who sat with me, stated that in his opinion the first finding ought to have been recorded as a verdict of "Not Guilty."

Under these circumstances I communicated with the Assistant-Judge, and it was deemed expedient to submit the matter to the judgment of the Court of Criminal Appeal.

The question for the determination of their Lordships is whether the verdict of "Guilty" pronounced under these circumstances is sustainable in law or not.

The prisoner is still in custody, but an order was made by the Court that he might be discharged on entering into recognizances, himself in 80*l.* and two sureties in 40*l.* each, to come up for judgment at the December sessions.

JOSH. PAYNE, Deputy Assistant Judge.

Dichie, for the prisoner.—The first verdict amounted to not guilty, and ought to have been received by the Judge, and he was not at liberty to refuse receiving it.

Kemp, contra, was not called on.

POLLOCK, C. B.—If the question is, as I collect from the case, this, whether the Judge may, after the jury has pronounced a verdict, require the jury to re-consider their verdict, and they do so, and find a different verdict, the latter can be received, it is utterly unarguable. I recollect that, when I was a young man, a person was tried for shooting the Hammersmith ghost, before three of Her Majesty's Judges and the Recorder. The jury retired to consider their verdict, and after some time came back and found a verdict of manslaughter. Thereupon each of the three Judges addressed the jury, and told them they were at liberty to acquit the prisoner or find him guilty, and that if he was guilty of anything he was guilty of murder. They again retired, and returned finding him guilty of murder. He was told that he would not be executed, and he was pardoned. There is no doubt that a Judge, both in a civil and criminal court, has a perfect right, and sometimes it is his bounden duty, to tell the jury to reconsider their verdict. He may send them back any number of times to reconsider their finding. The Judge is not bound to record the first verdict unless the jury insist upon its being recorded. If they find another verdict that is the true verdict.

WILLIAMS, J.—I will only add, that I do not wish it to be understood that the original verdict amounted to an acquittal.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

November 15, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. MASSEY. (a)

*Bankrupt—Concealing, embezzling, and not disclosing his goods—
Indictment—Sufficiency.*

An indictment against a bankrupt for embezzlement, &c., under the 12 & 13 Vict. c. 106, which alleges that he committed an act of bankruptcy "by being unable to meet his engagements with his creditors and by filing his petition in the court, &c.," but omits to state that such petition was founded upon a declaration of insolvency, is bad.

CASE reserved for the opinion of this Court by Blackburn, J.—
The prisoner was tried before me at the last Staffordshire Assizes, on an indictment of which the following is a copy:—

"Staffordshire to wit.—The jurors of our Lady the Queen upon their oath present, that heretofore, and before the committing of the offence hereinafter mentioned, to wit, on the 14th day of September, 1861, John Massey, being a trader within the meaning of the laws relating to bankruptcy, was indebted to John Thomas Warrington, late of Hanley, in the county of Stafford cheese-factory, in a certain sum of money exceeding the sum of fifty pounds, to wit, in the sum of one hundred and twenty-five pounds one shilling and one penny, for the price and value of certain goods and merchandise, before then sold and delivered by the said J. T. Warrington to the said John Massey, and that the said John Massey, so being such trader, and indebted as aforesaid, afterwards, to wit, on the day and year aforesaid, *did commit an act of bankruptcy by being unable to meet his engagements with his creditors, and by filing his petition in the Court of Bankruptcy for the Birmingham district, for adjudication of bankruptcy against himself.* And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the 16th day of September, in

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

the year aforesaid, upon the said petition for an adjudication of bankruptcy against himself being so filed in the Court of Bankruptcy, the said J. Massey was thereupon declared and adjudged bankrupt; and the said J. Massey so being adjudged and declared bankrupt, afterwards, to wit, on the day and year last aforesaid, feloniously did remove, conceal, and embezzle a certain part of his personal estate to the value of ten pounds and upwards, that is to say, three chests of tea, one box of tea of the weight of four hundred pounds, one cwt. of coffee, sixty boxes of cigars and thirty meerschaum pipes, and divers other valuable goods and chattels, with intent to defraud the creditors of him the said J. Massey, against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her Crown and dignity.

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Bankrupt—
Indictment.

"Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the 16th day of September, 1861, the said J. Massey, having committed the act or acts of bankruptcy aforesaid, was duly declared and adjudged a bankrupt as aforesaid, upon his own petition to the Court as aforesaid, and afterwards and within the time limited by law in that behalf, to wit, on the day and year aforesaid, the said J. Massey surrendered himself to the said Court of Bankruptcy, and was then duly sworn and then submitted himself to be examined before the said Court; and that the said J. Massey, upon the said examination, feloniously did not discover three chests of tea, one box of tea of the weight of four hundred pounds, one cwt. of coffee, sixty boxes of cigars, and thirty meerschaum pipes, and divers other valuable goods and chattels; and that the said J. Massey, upon his said examination, feloniously did not discover how or to whom, or upon what consideration, or at what time or times, he disposed of, assigned, or transferred the same, the same not having been really and *bonâ fide* before then sold or disposed of in the way of his trade, or laid out in the ordinary expenses of his family, with intent thereby to defraud the creditors of him, the said J. Massey, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity."

Mr. Waterfield, the Registrar of the Court of Bankruptcy at Birmingham, produced a document under the seal of the Court of Bankruptcy, purporting to be a copy of a declaration of insolvency by the prisoner in the form contained in Schedule D. to the Bankrupt Law Consolidation Act, 1849, bearing date 14th Sept., 1861, and purporting to be attested by William Allen, attorney-at-law, and certified by Mr. Waterfield in the following form:—

"I hereby certify the above to be a true copy of the declaration of insolvency, filed with the Registrar of the Court of Bankruptcy for the Birmingham district, on the 14th day of September, 1861."

"C. WATERFIELD, Registrar."

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He also produced a petition by the prisoner also bearing date 14th Sept. 1861. This was an original document, and was also under the seal of the Court; and he produced the adjudication of bankruptcy against the prisoner, dated 16th Sept., 1861. This was also both an original document and under the seal of the Court. There were other documents in bankruptcy produced, not, however, material to the points reserved.

The clerk to Mr. Allen (the attorney attesting the declaration of insolvency) was called as a witness, and proved that Mr. Allen acted as the attorney for the prisoner in the matter of the bankruptcy; that the witness saw the prisoner sign both the petition and the declaration of insolvency; that he, the witness, on the 14th of September, accompanied him to the Court of Bankruptcy at Birmingham, and saw him leave the declaration of insolvency there.

The Registrar of the Court having refreshed his memory by a memorandum on the petition, proved that the declaration of insolvency was delivered into his hands for the purpose of filing before half-past eleven o'clock in the morning of 14th September. He could not remember anything by independent memory as to this petition; but he said that it was his general practice to see that the declaration of insolvency was filed before receiving the petition founded on it.

There was ample evidence on the merits against the prisoner.

The prisoner's counsel objected that the indictment was wholly and incurably bad, as it not only did not allege that the prisoner had been adjudicated bankrupt on a valid act of bankruptcy, but averred that he had been adjudicated bankrupt on what was not an act of bankruptcy. He also contented that, independently of the objection to the form of the indictment, the evidence did not show that the prisoner was duly adjudicated bankrupt, as he said that there was not legal evidence that the declaration of insolvency was in fact filed before the petition, and, as he said, the attorney who purported to attest it ought to have been called as a witness.

No other objection was made to the formal proof of the bankruptcy, and the prosecution were not prepared to supply any additional evidence of it.

I would not stop the case on these objections, but left the case to the jury on the merits, and they found the prisoner guilty.

In answer to a question from me, they said that they believed that in fact the declaration of insolvency was filed before the petition on the same day.

I reserved the point whether the prisoner was on this evidence on this indictment properly convicted.

The prisoner was then tried and convicted on a charge of misdemeanor. He was sentenced on that to one year's imprisonment with hard labour, and on the present indictment to three years' penal servitude concurrently with the other sentence.

The question for the opinion of the court is whether the conviction was proper.

COLIN BLACKBURN.

Holroyd for the prisoner.—The indictment is bad. It alleges that the prisoner was adjudicated a bankrupt upon his own petition, but does not allege that the adjudication was founded upon the filing of a declaration of insolvency. There are three modes of proceeding in bankruptcy: 1. Under the arrangement clauses of the act; 2. Upon a petition presented by a creditor; 3. Upon a petition presented by the debtor himself under the 12 & 13 Vict. c. 106, s. 70, which enacts, that if any such trader shall file, &c., a declaration in writing, &c., that he is unable to meet his engagements, every such trader shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a petition for adjudication of bankruptcy shall be filed by or against such trader within two months from the filing such declaration." The indictment does not set out any act of bankruptcy. (a) It should have stated that the bankrupt filed a declaration of insolvency. Sect. 89 provides that the mode of procedure to obtain adjudication shall be by petition. But an adjudication in the case of the bankrupt's own petition must be founded upon the filing of the declaration of insolvency. (He was then stopped by the court.)

Rochfort Clarke for the prosecution.—The omission to state that a declaration of insolvency was filed is immaterial. It is sufficient to state in the indictment merely that the person was adjudicated a bankrupt. [MELLOR, J.—But that you have not done. You have stated a special act of bankruptcy, "that the prisoner committed an act of bankruptcy by being unable to meet his engagements with his creditors, and by filing his petition to the Court of Bankruptcy." And you have not alleged that the prisoner filed his declaration of insolvency pursuant to sect. 70. CHANNELL, B.—It would have done if you had stated that he had filed his declaration of insolvency—that he was unable to meet his engagements with his creditors. POLLOCK, C. B.—Was it necessary to aver what the act of bankruptcy was? Would it not have been sufficient to state merely that, on his petition for adjudication being filed, he was thereupon adjudicated a bankrupt?] It would, and then the principle *omnia rite acta presumuntur* would have applied.

WIGHTMAN, J.—But here the contrary unfortunately appears.

POLLOCK, C. B.—We are all of opinion that the indictment cannot be supported. It might have done under the recent Act of 1861, but it is not sufficient under the 12 & 13 Vict. c. 106, which Act was in force at the time the offence was committed. Our judgment must therefore be for the defendant.

The rest of the Court concurring,

Conviction quashed.

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(a) See *Reg. v. Lands* (7 Cox Crim. Cas. 89).

COURT OF CRIMINAL APPEAL.

November 22, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. I. M. EVANS. (a)

False pretences—Partners—Money obtained by wilful misrepresentation

A. having invented an improved lamp, entered into a partnership deed with B. and C. for carrying out and vending the subject of the invention. By a subsequent verbal agreement with his co-partners he was to travel about to obtain orders for the lamps upon a commission. On all orders received by him such commission (besides his travelling and personal expenses) was to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits. By falsely representing to his co-partners that he had obtained orders upon which his commission would be 12l. 10s., he obtained from them that amount :

Held, that, as the subject-matter of the misrepresentation would come under consideration in the partnership accounts, such misrepresentation was not sufficient to sustain an indictment for false pretences against A.

CASE reserved by the Recorder of Chester.

The prisoner, Isaac Mark Evans, was tried before me at the Quarter Sessions for the city and borough of Chester, held on the 4th July, 1862, on an indictment charging him with having unlawfully obtained from David Williams and Henry Wadkin certain sums of money by falsely pretending to them that he had obtained an order from the Wynn Hall Colliery Company, near Ruabon, for the sale to them of 100 patent lamps called "Miner Lamps," with intent to defraud.

It appeared in evidence that the prisoner, having invented an improved lamp for the use of miners, on the 16th November 1861, David Williams, Henry Wadkin, and the prisoner, entered into partnership together, by a deed which, after reciting that the prisoner claimed to be the inventor of an improved miners' lamp

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

and had applied for letters patent granting to him the sole use, benefit, and advantage of the said invention within the United Kingdom, and that the prisoner, Williams, and Wadkin had agreed to become partners for the purpose of working the said patent and bringing the said invention into use, and manufacturing and vending the said improved miners' lamp, upon the terms and under the stipulations thereafter mentioned, witnessed that it was thereby agreed, and each of them the said parties did thereby for himself, &c., covenant with the others of them, &c., in manner following (that is to say, amongst other things):—

1. That they the said Isaac Mark Evans, David Williams, and Henry Wadkin shall be partners in the trade or business of working and carrying out the said patent, and bringing the said invention into use, and manufacturing and vending the said "Improved Miners' Lamp," from the day of the date of these presents for the term of fourteen years.

2. That the firm or style of the said partnership shall be Williams, Wadkin, and Evans, and that the said trade or business shall be carried on in such place of business as the said partners shall from time to time agree upon.

3. That the said I. M. Evans shall forthwith take all necessary and proper steps for obtaining the said letters patent, and for perfecting and completing the said invention.

4. That the expense of obtaining the said letters patent, and of all drawings and models, and other things which may be necessary for bringing the same and the said invention to perfection, shall be paid and borne by the said partners equally.

5. That the said letters patent, as soon as the same shall be obtained, shall be and become the property of the said partners in equal shares.

6. That the said I. M. Evans shall, when called upon by the said D. Williams and H. Wadkin so to do, and at the cost of the person or persons requiring the same, by a proper deed and assurance, or proper deeds and assurances, well and effectually assign one equal undivided third part or share of the said letters patent, and the rights and privileges thereby granted, to the said D. Williams, his executors, administrators, and assigns, and one other equal undivided third part or share thereof unto the said H. Wadkin, his executors, administrators, and assigns.

7. That the capital of the said partnership shall consist of the sum of 300*l.*, and that the same sum of 300*l.* shall be advanced and lent to the said co-partnership by the said D. Williams and H. Wadkin in equal shares, in such sums as may from time to time be required for carrying on the said trade or business.

8. That the said sum of 300*l.*, together with interest thereon at the rate of 5 per cent. per annum, from the time the money is advanced until the same is repaid, shall be repaid to the said D. Williams and H. Wadkin out of the first profits to arise from the said trade or business before any profits are divided between the said co-partners.

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9. That the said sum of 300*l.* is not to include the sum expended or incurred in obtaining the said letters patent, or the drawings, models, and other things which may be necessary for bringing the said invention to perfection, but that the sums expended and paid by the parties hereto in the shares mentioned in the fourth paragraph of these presents shall not be repaid them, or any of them, out of the capital or profits of the partnership.

14. That the net profits, after the payment thereof of all costs and expenses, and after payment of the said sum of 300*l.*, shall be received by the partners equally.

After the execution of the deed Williams and Wadkin advanced the prisoner money to pay the expenses of going to London, in order to exhibit the lamp and of obtaining the patent. After he returned, he on several occasions obtained from them further advances of money, until at length, in February, 1862, they refused to give him any more money unless he agreed to go out as agent to sell the lamps on commission.

A verbal agreement was thereupon made between Williams and Wadkin, and the prisoner, that the prisoner should travel about the country to obtain orders for the lamps upon the terms that Williams and Wadkin should pay him a commission of 15 per cent. on all orders received by him, that is to say, 2*s.* 6*d.* on each lamp, the price of the lamp being 15*s.*, besides his travelling and personal expenses, such commission to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits.

On the 14th March, 1862, the prisoner came to Williams and Wadkin, and stated that he had got an order from the Wynn Hall Colliery Company, near Ruabon, for 100 lamps, to be made in a month, and paid for in a month after delivery.

In the faith that this statement was true, Williams and Wadkin gave the prisoner several sums of money, amounting in all to the sum of 12*l.* 10*s.*, the commission which would be due to him under the agreement above mentioned, on the sale of 100 lamps.

No such order, nor any order except for one specimen lamp has in fact been given by the Wynn Hall Colliery Company to the prisoner.

It was objected for the prisoner that the indictment could not be sustained, on the ground that the money obtained by him from Williams and Wadkin was money in which he was interested as a partner, under the provisions of the deed of partnership; and further, that the intent to defraud was negatived by the fact that the money payable to the prisoner for commission came out of the partnership funds.

I reserved the questions for the consideration of the Court in Crown Cases Reserved, and left it to the jury to say whether the prisoner obtained the money by means of the false statement made by him with intent to defraud.

The jury found the prisoner Guilty, and I respited the judgment, admitting the prisoner to bail.

The question upon which I respectfully request the decision of the Court is, whether the prisoner was entitled to be acquitted on either of the grounds above stated.

No counsel appeared on either side.

POLLOCK, C. B.—The facts in this case appear to be, that the defendant entered into partnership with two other persons, and by a verbal agreement, made subsequently, they agreed to make him an agent for a particular purpose connected with the business of the partnership, as to which his commission, travelling, and personal expenses were to be paid out of the partnership funds before any division of the profits took place. The indictment was for obtaining money by false pretences, in respect of charges for which there was no foundation. As, before any division of profits took place, it was specifically agreed that such charges were to be paid out of the capital funds of the partnership, it was necessarily a matter of account between them, and such charges would, if there was a real foundation for them, come into the accounts and be deducted from the profits before any division was made. The defendant's misrepresentation (and it was nothing more) to his partners would be overhauled when the accounts were gone into, and therefore we think that the defendant was not guilty of obtaining money by false pretences. I, speaking for myself—and I beg to say that no other member of the Court is responsible for this opinion—entertain a confident opinion that the statute was never intended to meddle with the real business of commerce, unless the falsehood really amounted to a piece of swindling: but when it was a mere fraudulent statement made in the course of a commercial transaction, it was never intended to visit it with an indictment. I wish to express my own opinion on this point very strongly, because I think that a departure from this rule would make every knavish transaction in commercial matters the subject of indictment, which would be going far beyond what was intended by the Legislature when obtaining money by false pretences was made punishable by indictment.

The rest of the Court concurring,

Conviction quashed.

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— Misrepresentation.*

COURT OF CRIMINAL APPEAL.

November 15th, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. FALLON. (a)

*Pleading — Indictment — Accessory after the fact—24 & 25 Vict. c. 9—
ss. 3, 4.*

*An accessory after the fact to a felony cannot be convicted upon an
indictment charging the commission of the felony only; he should be
indicted as an accessory after the fact.*

CASE reserved at the Manchester Quarter Sessions.
At the General Quarter Sessions of the Peace, holden
for the city of Manchester, before me, the Assistant Barrister, duly
appointed by the Recorder of the said city to preside in the second
Court at the said General Quarter Sessions in August last, William Fallon was tried on the following indictment;—

“City of Manchester, in the county of Lancaster, to wit.—
The jurors of our Lady the Queen, upon their oath, present that
William Fallon, late of the city of Manchester, in the county of
Lancaster, on the 25th day of July, 1862, at the city aforesaid
in the county aforesaid, and within the jurisdiction of this Court,
one purse, one pencil case, and nine pawn tickets, the property of
Charles Rogerson, from the person of the said Charles Rogerson,
then and there feloniously did steal, take, and carry away, against
the form of the statute in such case made and provided, and
against the peace of our Lady the Queen, her Crown and
dignity.”

There was a second count in the indictment charging a previous
conviction for felony against the prisoner.

At the close of the case for the prosecution, the counsel for
the prisoner submitted that there was no evidence to go to the
jury to prove the felony charged in the indictment.

For the prosecution it was argued that there was evidence
upon which the jury might convict the prisoner of the felony
charged in the indictment, and at all events there was ample

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

evidence to prove that the prisoner was an accessory after the fact to the commission of the felony charged in the indictment; and it was alleged that the prisoner might be convicted of being such accessory after the fact upon the indictment for the felony.

I left the case to the jury to say whether the prisoner was guilty of the felony charged in the indictment, or was guilty of being an accessory after the fact, to the commission of the felony charged in the indictment, or whether they acquitted him altogether.

The jury found the prisoner Not Guilty of the felony charged in the indictment, but Guilty of being an accessory after the fact to the commission of the said felony, which finding was supported by abundant proof.

I respited the judgment, and for want of bail the prisoner remains in custody.

The question for the opinion of the Court for the Consideration of Crown Cases Reserved is, whether the prisoner was properly convicted.

W. H. HIGGIN.

By the 24 & 25 Vict. c. 94, s. 3, it is enacted, that whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted and convicted, either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as an accessory after the fact to the same felony, if convicted as an accessory, may be punished.

Samuel Taylor, for the prosecution, referred to the above enactment, and contended that he might be properly convicted as an accessory after the fact upon this indictment. [WIGHTMAN, J.—What is the substantive felony by enactment?] In this case the stealing of the purse charged in the indictment.—[WIGHTMAN, J.—I should say it was the felony of being an accessory after the fact. MELLOR, J.—Sect. 4 provides for the punishment of accessories after the fact, imprisonment not exceeding two years. Upon a conviction under the count for stealing, the punishment could be more.]

No counsel appeared for the prisoner.

POLLOCK, C. B.—The prisoner ought to have been indicted for the substantive felony of being an accessory after the fact, of which offence he was found guilty. The prisoner was indicted for an offence of which he was not found guilty, and he has been found guilty of an offence for which he was not indicted.

The rest of the Court concurring,

Conviction quashed.

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*Indictment—
Accessory after
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COURT OF CRIMINAL APPEAL.

November 15th, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. GEORGE THOMPSON. (a)

*Larceny—Intent to steal money received for a special purpose—Owner's dominion over it.**A lady at a railway terminus, there being a great crowd at the pay place, and seeing the prisoner within the barrier and near that place, requested him to get her a ticket, which he consented to do. She then handed him a sovereign, but instead of getting the ticket he ran away with her money. It was found by the jury that he placed himself near the pay place for the purpose of fraudulently obtaining money in that way:**Held, that, as he took the money with intent to steal, and the lady never parted with her dominion over it, he was guilty of larceny at common law.*

THE following case was reserved at the Middlesex Sessions.

The prisoner was tried on the 6th October, 1862, for stealing 1l. in money, the property of a man named Bates.

From the evidence it appeared that on the morning of the 13th September, an excursion train for York was about to start from the King's Cross terminus of the Great Northern Railway. There was a considerable crowd, and Mrs. Bates, the prosecutor's wife, being on the outside of the barrier, saw the prisoner near the pay place, apparently about to take a ticket for himself. She asked him if he would get one for her for York. He said, "Yes." She then handed him a sovereign, the price of the ticket being only 10s. The prisoner received the sovereign, but instead of applying for any ticket stooped under the rail and ran across the platform.

Mrs. Bates obtained the assistance of a constable, and in a few minutes they found the prisoner, who at first denied that he was the person, but afterwards offered Mrs. Bates a return-ticket for Doncaster. She did not at the moment observe what it was, but said, "If you have taken my ticket, where is my change?" Upon which he handed her 2s. She said she wanted 10s. as her change.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

He said he would go and get it; but she refused to allow him to go away, and gave him into custody.

He had a sovereign in his hand when he was taken, and there were found upon him two return-tickets for Doncaster.

The prisoner's counsel submitted that there was no larceny; first, because there was no trespass, Mrs. Bates having voluntarily parted with the sovereign to the prisoner; and secondly, because it did not come within the meaning of the Bailee Act, as that Act only applied to cases where the same property was to be returned, and not where different property was to be substituted for it. He cited *Reg. v. Garrett* (2 Fos. & Fin. 14); and *Reg. v. Hassall* (8 Cox Crim. Cas. 491). (a)

The counsel for the prosecution, contra, referred to *Reg. v. Wells* (1 Fos. & Fin. 109), (b) as somewhat analogous in principle.

The prisoner's counsel having addressed the jury, the Deputy Assistant-Judge, who tried the case, told them in summing up, that if they thought, from the prisoner's conduct, that he did not place himself where Mrs. Bates found him with the *bonâ fide* intention of taking a ticket for himself; and that at the time he received the sovereign from her he intended to steal it; and also that she did not intend to part with the property except for the purpose of obtaining her ticket and 10s. in change; then he thought they were at liberty to find the prisoner guilty.

The jury found the prisoner Guilty; and said that in their opinion he placed himself near the pay place for the purpose of obtaining money in the manner described.

The questions reserved were: first, whether the verdict of guilty is, under the circumstances, sustainable by the general law as to larceny; and if not, secondly, whether it is or is not sustainable under the particular provisions of the 24 & 25 Vict. c. 96, s. 3, relating to larceny by bailees.

Upon the first point, *Reg. v. Brown* (2 Jur. N.S. 192), (c) may be referred to.

The prisoner remains in custody awaiting the judgment of the Court.

Ribton for the prisoner.—In all cases of larceny there is a trespass: but here the sovereign was voluntarily parted with by the owner without any solicitation from the prisoner. It was only a breach of trust, not larceny. In *Semple's* case (1 Leach, 420), the chaise was obtained by a trick, and with a felonious intent originally, and the hiring was a mere pretence. [WIGHTMAN, J.—I find this passage in the usual text-book: "If the owner of goods deliver them to another, but be present all the time they

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(a) In *Reg. v. Garrett*, the marginal note is, "A bailment under the Fraudulent Trustees Act (20 & 21 Vict. c. 54), means one where the same property is to be returned." The same point was decided in *Reg. v. Hassall*.

(b) In *Reg. v. Wells*, it was decided that a carrier who had received money to procure goods, and had obtained and duly delivered the goods, but fraudulently retained the money, was guilty of larceny, under sect. 4 of the Fraudulent Trustees Act.

(c) In *Reg. v. Brown*, the prisoner obtained the money from the prosecutor by a trick, intending at the time to appropriate it to his own use, and it was held to be larceny.

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are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery: and if the person to whom he has delivered them make away with them, and convert them to his own use, he will be guilty of larceny. As, for instance, if the owner gave the goods to a man to carry, and accompany him the same time, if the man runs away with the goods, he is clearly guilty of larceny:" (Arch. Crim. Pl. 14th ed. 290.)] Here the prosecutrix did not expect to get back the sovereign. In *Reg. v. Thomas* (9 C. & P. 741), A. was treating B. at a beerhouse, and A., wishing to pay, put down a sovereign, desiring the landlord to give him change; she could not do so, and B. said that would go out and get change. A. said, "You won't come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change. Held no larceny, as A., having permitted the sovereign to be taken away for the purpose of being changed, he could never have expected to receive the specific coin, and had therefore divested himself of the entire possession of it. That case in point. [WILLIAMS, J.—There was a case before Maule, J. in which he held that a parish clerk who took a half-crown out of the sacrament plate was guilty of larceny, and that the property was properly laid in the member of the congregation, who put in the plate. MELLOR, J., referred to *Rex v. Atkinson* (1 Leach 302).]

Cooper, for the prosecution, was not called upon.

POLLOCK, C. B.—We are all agreed that the prisoner was guilty of larceny at common law. My brother Wightman has read from a text book a paragraph which applies to this case. In this case Mrs. Bates gave the prisoner a sovereign for a particular purpose, and he took the money with the intention of stealing it. The lady never intended to part with her dominion over it and he but merely used his hand as her own.

The rest of the Court concurred.

Conviction affirmed—

COURT OF CRIMINAL APPEAL.

November 15th and 22nd, 1862.(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNEL, B., and MELLOR, J.)

REG. v. BURGESS. (a)

*Quarter Sessions—Jurisdiction—Attempt to commit suicide.**suicide is not murder within the 24 & 25 Vict. c. 100, ss. 11 and 15, and therefore attempting to commit suicide is a misdemeanor triable at Quarter Sessions.*

CASE reserved at the Middlesex Sessions.

The prisoner was tried on an indictment, which charged at she, "on the 16th of September, 1862, unlawfully and wilfully did attempt and endeavour to commit a certain felony, that to say, that she the said Elizabeth Burgess, on the day and at the place aforesaid, unlawfully and wilfully did attempt and endeavour feloniously, wilfully, and of her malice aforethought, to kill and murder herself the said Elizabeth Burgess, against the form of the statute in such case made and provided."

To this indictment she pleaded Guilty.

Before passing sentence, it was suggested that Courts of Quarter Sessions had no longer jurisdiction over the offence by reason of the passing of the statute 24 & 25 Vict. c. 100.

The 11th, 12th, 13th, and 14th sections of that statute relate to attempts to commit murder by different specified methods; and the 15th section enacts that "Whosoever shall, by any means other than those specified in the preceeding sections, attempt to commit murder, shall be guilty of felony, and be liable to be kept in penal servitude for life."

By the 5 & 6 Vict. c. 38, s. 1, Courts of Quarter Sessions are prohibited from dealing with any felony in respect of which sentence of transportation for life can be passed upon a person not previously convicted of felony.

By the 20 & 21 Vict. c. 3, s. 2, penal servitude is substituted for transportation.

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—

Sentence was respited, and the prisoner was committed to the House of Correction for the county.

The judgment of this Court was prayed, whether the above conviction could, in point of law be sustained.

Quarter Ses-
sions—
Jurisdiction.

November 15.—*Besley* for the prisoner.—An attempt to commit suicide is not a misdemeanor, but merges in the felony of attempting to commit murder which is made punishable with penal servitude for life, or for any term not less than three years, or with imprisonment by the 15th section of 24 & 25 Vict. c. 100. The Sessions, therefore, had no jurisdiction. The indictment itself charges the prisoner with attempting to murder herself against the form of the statute: (*Reg. v. Cross*, 1 Ld. Ray. 711.)

Poland for the prosecution.—This indictment charges a common law misdemeanor, triable at Sessions. Sect. 15 of 24 & 25 Vict. c. 100, applies only to attempts to murder another, and not to suicidal attempts. The averment in the count, "against the form of the statute," &c., may be rejected as surplusage. It is no more than an indictment at common law for attempting to commit felony. *Felo de se* is not treated as murder in the books: (*Hawkins* P.C. 68; 4 Bl. Com. 189; *Blount's Law Dic.* (1773); *Cowell's Law Dic.* (1723); *Jervis on Coroners*, 322; 1 Wms. Saund. 356, n. a.) *Felo de se* is not murder within the exception of murder in a pardon (*Reg. v. Ward*, 1 Lev. 8; *Tombes v. Etherington*, 1 Lev. 120). In *Reg. v. Russell* it was held that the 7 Geo. 4, c. 64, s. 1, although it applied to accessories before the fact to murder, did not apply to accessories before the fact to suicide. The Quarter Sessions is the proper Court to deal with such cases. It could not have been intended by the Legislature to impose penal servitude for life in such cases.

Besley, in reply cited, *Reg. v. Dyson* (R. & R. 523), and *Reg. v. Alison* (8 C. & P. 418). *Cur. adv. vult.*

November 22.—*POLLOCK*, C.B.—We are of opinion that the jurisdiction of Courts of Quarter Sessions is not taken away. To construe the statute of 24 & 25 Vict. c. 100, according to the argument for the prisoner, would bring the matter to this, that persons attempting to commit suicide by wounding would be liable to be indicted for wounding with intent to kill. We think, therefore, that the jurisdiction in such cases is not taken away; and as my brother Wightman desires me to say, that an attempt to commit suicide is not an attempt to commit murder within the meaning of the sections of the Act referred to.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 22nd, 1862.(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. POYNTON. (a)

Post-office—Secreting letter—Larceny.

A letter carrier, whose duty it was, in case he was unable to deliver any letter, to bring it to the post-office on his return from delivery, not having delivered a letter containing money, gave no account of it, and being asked why he had not delivered it, produced it unopened, and the coin safe within, from his trousers pocket, stating, untruly, that the house where it ought to have been delivered was closed. Upon an indictment for stealing the letter, the jury found him guilty, and that he detained it with the intention of stealing it:

Held, that so dealing with the letter amounted to larceny.

CASE reserved by Pollock, C.B., for the opinion of this Court.

Thomas Poynton, a letter carrier, was tried before me at the 1st Assizes for the borough of Leicester, and convicted upon an indictment charging him with having, while employed under the post-office of the United Kingdom, feloniously stolen, taken and carried away one post-letter, the property of Her Majesty's Postmaster-General, containing two half-sovereigns, and addressed as follows:—"Stephen Sullivan, Dealer, Black Horse, Belgrave-gate, Leicester, Care of Mrs. Swift."

A second count charged him with embezzling, and a third with secreting the said letter; and in the fourth count he was charged with larceny of the same letter, both it and the money being laid as the property of Charles Donald Style.

On the trial it was proved that a test-letter, addressed as above stated, was prepared by one of the inspectors of the Post-office, and posted at Melton on the night of the 1st May. It arrived at the post-office at Leicester in due course on the following morning, and was, among others, sorted to the prisoner for delivery.

The letter in question ought to have been delivered by the

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prisoner at its place of destination between half-past eight and nine in the morning. The letter, however, was not delivered, and the prisoner returned to the post-office as usual, and reported himself to the postmaster as having finished his delivery.

It was the duty of the prisoner, in case there were any letters which from any cause he was unable to deliver, to bring them back to the post-office.

On his return from delivery, he brought the pouch which contained four which he had so been unable to deliver, but none of which contained coin. The letter in question was not returned, nor did the prisoner give any account of it.

It having been shortly afterwards ascertained that the letter in question had not been delivered, the inspector who had caused it to be posted asked why he had not delivered it. The prisoner at once produced from his right hand trousers pocket the letter in question, which was unopened, and the coin safe within it. Upon being asked why he had not delivered it, the prisoner stated that the house was closed. This statement, however, was proved to be untrue. The prisoner further stated that he was going to deliver it in the afternoon.

I directed the jury that, if they were satisfied that the prisoner put the letter into his pocket with the intention of stealing or secreting it, he might be convicted.

I reserved for the consideration of the Court the question whether, under the circumstances, the prisoner's dealing with the letter amounted to actual stealing.

The jury found the prisoner Guilty, and stated they were of opinion that the prisoner detained the letter with the intention of stealing it.

I ordered the prisoner to be discharged on giving bail.

Merewether for the prisoner.—It cannot be denied that at one time the prisoner entertained an intention to steal, but when asked about it he at once produced the letter. The letter was lawfully in the prisoner's possession, and though, when he put it in his pocket, he had the intention of stealing it, he may have changed his mind and intended to deliver it in the afternoon. It may be there was an attempt to steal, but it cannot be said that he stole it. [POLLOCK, C. B.—If a man puts a letter into his pocket with the intention of stealing it, and carries it about all day, he does not cure the matter by afterwards putting it back again in its proper place. The letter was in his pocket, where it ought not to have been.] No doubt under the Post-office regulations that was an unlawful place for it to be in; but, although he began to steal it, he stopped before he had stolen it, and at the most there was only evidence of an attempt to steal, but not of the complete offence. [POLLOCK, C. B.—No one can be more lawfully in possession of another's property than a carrier's man, and yet if he removes the property from its proper place with the intention of stealing it, he is guilty of larceny.] There the act of removal with the intent determines the bailment. [POLLOCK, C. B.—So if a Post-

office servant breaks the Post-office regulation and puts a letter into his pocket with the intention of stealing it he determines the bailment.] In this case the *asportavit* was not complete.

Boden (*Mellor* with him), for the prosecution, was not called upon.

POLLOCK, C. B.—We are all of opinion that there is no doubt of the conviction being right. I reserved the case during the trial, and if there had been any opportunity for reconsidering after the finding of the jury I should have withdrawn it.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

November 22nd, 1862.

(Before **POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,**
CHANNELL, B., and MELLOR, J.)

REG. v. M'ATHEY. (a)

Husband and wife—Felonious receiving.

A husband and wife were jointly indicted for stealing and receiving, and the jury found the wife guilty of stealing without any constraint on the husband's part, and the husband guilty of receiving the stolen property, knowing at the time when the property was delivered to him that it had been stolen by his wife :

Held, that the husband was properly convicted of receiving.

CASE reserved at the General Quarter Sessions for Northumberland.

John and Mary M'Athey were jointly indicted for stealing from the person and feloniously receiving.

The jury found that the prisoners were husband and wife, and returned a verdict of Guilty upon the first count against the wife, and of Guilty upon the second count against the husband for receiving the stolen property, knowing it to have been stolen.

At the request of the counsel for the prisoners the Chairman asked the jury; first, whether the female prisoner acted voluntarily with respect to her husband, and they found that she did act

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voluntarily, and without any constraint on the part of her husband; and they were further asked whether the male prisoner received the stolen property from his wife, knowing it to have been stolen by her, and they found that he had.

Upon this it was objected by counsel for the male prisoner that the case fell within the scope of that of *Reg. v. Wardroper* (8 C. Crim. Cas. 284; 29 L. J. 116, M. C.), (a) and that the verdict amounted to one of acquittal of the male prisoner.

The Court granted this case, and the question was whether the male prisoner could be convicted of feloniously receiving the property from his wife stolen by her under the circumstances above stated. No counsel appeared on either side.

POLLOCK, C. B.—In this case we desired to know if the jury had found that the husband, when the goods were delivered to him by the wife, knew that they were stolen, and in the case amended, it appears that the jury did so find. The conviction is therefore right.

Conviction affirmed

(a) In that case A., B., and B.'s wife were indicted jointly for burglary and receiving; the jury found A. guilty of burglary, and B. and his wife of receiving. Part of the property was found in B.'s house, and from that fact and others, the jury were warranted in finding B. guilty of receiving. To connect the wife with the matter it was proved that some time after the burglary the wife was seen dealing with part of the stolen things, when she made a statement importing a knowledge that the things had been stolen, and that they were to be made away with. The judge at the trial declined to leave it to the jury to find whether the wife received the things from her husband or in his absence, and the jury found B.'s wife guilty of receiving. Held, that the questions were proper for the consideration of the jury, and that the conviction could not be supported.

COURT OF CRIMINAL APPEAL.

November 15th and 22nd, 1862.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. EDWARD GARDNER. (a)

Larceny—Finding—Withholding, in hope of a reward.

One who, in the expectation of a reward, withholds from the owner, whom he knows, a lost cheque received from the finder, is not guilty of stealing the cheque.

THE following case was reserved at the Middlesex Sessions. Edward Gardner was tried on an indictment charging him in the first count with stealing one banker's cheque and valuable security for the payment of 82*l.* 19*s.*, and of the value of 82*l.* 19*s.*, and one piece of stamped paper of the property of James Goldsmith.

In the second count the property was stated to be the property of Thomas Boucher.

It appeared from the evidence of Thomas Boucher, a lad of fourteen, that he found the cheque in question; that having met the prisoner Gardner, in whose service he had formerly been, he showed it to him; that the prisoner (Thomas Boucher being unable to read) told him it was only an old cheque of the Royal British Bank: that he wished to show it to a friend, and so kept the cheque; that Boucher very shortly on the same day went to prisoner's shop and asked for the cheque; that the prisoner from time to time made various excuses for not giving up the cheque, and that Boucher never again saw the cheque.

It also appeared that the prisoner had an interview with Goldsmith, in which he said that he knew the cheque was Goldsmith's, asked what reward was offered, and upon being told 5*s.*, said he would rather light his pipe with it than take 5*s.*

The cheque has never been received either by Goldsmith or Boucher, though there was some evidence (not satisfactory) by the prisoner's brother of its having been inclosed in an envelope and put under the door of Goldsmith's shop.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The jury found "That the prisoner took the cheque from Thomas Boucher in the hopes of getting the reward; and, if the larceny, we find him guilty."

Thereupon the Judge directed a verdict of Guilty to be entered and reserved for the opinion of this Court whether upon the actual finding the prisoner was properly convicted.

November 15.—*Best* (with him *Besley*) for the prisoner argued that the finding of the jury disproved the felonious intent. In *v. York* (3 Cox Crim. Cas. 181) a similar finding of the jury held to amount to "Not Guilty." (He was then stopped.)

Kemp for the prosecution.—The defendant read the cheque, knew the owner. In this respect the case differs from *Re Christopher* (8 Cox Crim. Cas. 91; 28 L. J. 35, M. C.), resembles *Reg. v. Moore* (8 Cox Crim. Cas. 416; 30 L. J. M. C.). As against all the world but the true owner, the Boucher, was the owner, and the prisoner took the cheque from him against his will, and may be convicted on the second count.

POLLOCK, C.B.—That is the case of *Armory v. Delar* (Str. 505), where a boy was held entitled to sue his master for a jewel which he had found and his master had taken from him. It was not supposed that the master was guilty of felony. Till the jewel was not ear-marked, but every one who can read can tell to whom a cheque belongs. Properly speaking a cheque is not a chattel, and is not the subject of larceny. We must take that the cheque was stamped, and being stamped it was not a piece of paper—it was a cheque.

Cur. adv. vult.

November 22.—POLLOCK, C. B.—In this case the prisoner was convicted of stealing a cheque. He took the cheque away from a boy who found it, and did not immediately give information to the owner, but withheld it in the expectation of getting a reward. The taking of the cheque from the finder was not a felonious taking and the merely withholding it in the expectation of a reward was not a larceny.

The rest of the Court concurring,

Conviction quashed.

COURT OF CRIMINAL APPEAL.

November 22nd and 29th, 1862.

THE POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. BARRETT. (a)

Prothel—Keeping—Evidence—Landlord—Weekly tenants.

Owner of a house proved to be a common bawdy-house, let it out to tenants, but did not appear to have got any additional rent by reason of the purposes to which the house was applied. He was repeatedly remonstrated with as to the manner in which the house was conducted, and called upon to abate the nuisance, and was told that if he did so, an indictment would be preferred against him. He, however, took no steps and allowed matters to go on as before. It was held that he was not guilty of keeping a common bawdy-house or of being accessory thereto.

The following case was reserved at the Middlesex Sessions. Thomas Barrett was tried before me at the Middlesex Sessions, in November, 1862, upon an indictment which in the first and second counts charged him and two other persons with keeping a common bawdy-house and disorderly house in the parish of St. George-in-the-East, and in two other counts he was charged alone with keeping another common bawdy-house and disorderly house in the same parish. Evidence in question were proved to be common bawdy-houses and robberies had been frequently committed in them by thieves and other idle and disorderly persons who frequented the houses day and night. Evidence against the other defendants, who were included in the indictment was conclusive, and no question arises as respects

Evidence against Thomas Barrett, in addition to the proof as to the nature of the houses, was, that he, Thomas Barrett, was the owner of both houses, which he let to weekly tenants, and had been repeatedly remonstrated with as to the manner in which the houses were conducted, and called upon to interfere to abate the nuisance.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Of these warnings he took no notice, and some months before the prosecution was instituted he was served with a written notice, to the effect that the police and inhabitants complained the vicious and disorderly conduct of his tenants, and that unless he took steps for removing them, and for the discontinuance of the unlawful practices, which for a long time had been carried on and still were carried on, in his said houses, an indictment would be preferred against him and all other parties concerned in the unlawful practices complained of, and that in that case the notice then served would be given in evidence against him.

The defendant, Thomas Barrett, took no steps with the view of complying, but continued to go to the houses and receive the rent from the occupiers every week until the present prosecution was commenced.

It was not proved that the defendant obtained any additional rent by reason of the nature of the occupation.

The prisoner's counsel contended that there was no evidence for the jury to consider, but, as I stated that I should take their opinion upon the facts, he addressed the jury.

I told the jury that if they were satisfied that the defendant well knew the purposes for which the houses were occupied, and having the power of removing the tenants by a week's notice, had continuously permitted them to remain, and to conduct them as common bawdy-houses, notwithstanding the warnings and notices given him, that they should find him guilty.

The jury found the defendant Guilty; and I have to request the judgment of this Honourable Court whether the conviction can in point of law be sustained.

The defendant has been admitted to bail until the decision of this Honourable Court is pronounced.

WM. H. BODKIN, Assistant Judge of the
November 19, 1862. Middlesex Sessions.

November 22.—Ribton for the prisoner Barrett.—The conviction cannot be sustained. The prisoner was in no sense the keeper of a common bawdy-house. He was merely the landlord, and received the rent, and although he could have prevented the house being used for the purpose it was used, but did not, that is not sufficient to support a conviction of him under this indictment. The case of *Rich v. Basterfield* (4 C. B. 783), is in point, the marginal note of which is: "Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession. Where, therefore, an action was brought against A., the owner of premises, for a nuisance arising from smoke issuing out of a chimney to the prejudice of the plaintiff, in his occupation of an adjoining messuage, on the ground that A., having erected the chimney and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein."

the action would not lie; held, also, that inasmuch as were in the occupation of B., a tenant at the time theghted, A. was entitled to a verdict on the plea of 'not he allegation as to possession having reference to the he nuisance complained of was committed, and not to which the chimney was erected." In that case, as in , the tenancy was a weekly one. *Rex v. Pedley* 822), was reviewed in that case.

r the prosecution.—The conviction was right. No e rooms had been let upon lease, and after the posses- the tenants they had been converted to this immoral e landlord would not have been responsible. But indictment at common law, alleging that the land- nants jointly kept a common bawdy-house; and the rrett is in the position of an accessory before the fact. e aid of the statute 25 Geo. 2, c. 36, the prisoner is t common law if he is a party to the committing of the [n *Rich v. Basterfield* the nuisance arose from burning he landlord was no party to that. In *Pierson's* case m. 1197), it was held that a lodger who keeps only a for the use of bawdy is indictable for keeping a bawdy-
Cur. adv. vult.

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29.—POLLOCK, C. B.—We are of opinion that the cannot be sustained, the defendant not really being of a common bawdy-house in point of law. He was owner of the house, letting it to another person who an immoral purpose. The defendant had nothing to at, and did not participate in the profits of so using nothing to do with the immoral part of the transaction, nowing the way in which the house was used. My lliams very shortly expressed the view we take, when t all that the defendant did was not to give the tenants it. To construe that to be an offence would be going at the Act intended.

Conviction quashed.

COURT OF QUEEN'S BENCH.

January 12, 1863.(Before COCKBURN, C.J., WIGHTMAN, CROMPTON, and
MELLOR, JJ.)

REG. v. PEARCE. (a)

County Court—Perjury—Assignment of, on evidence on judgment-summons—Marriage after judgment.

A feme sole obtained a judgment in the G. County Court, and then married S. She afterwards took out a judgment-summons in her name when sole, in L. County Court, without having made her husband a party to the judgment. At the hearing of the summons the judge of the L. Court amended the summons by striking out the name of the plaintiff, and substituting S. and wife. After the alteration the defendant was sworn and examined, and committed perjury. He was then indicted and found guilty of perjury :

Held, that the amendment was without jurisdiction, and that there being no cause in the altered name, the conviction could not be supported.

INDICTMENT for perjury :

The jurors of our Lady the Queen upon their oath present that heretofore, to wit, on a certain day before the 9th day of March, 1855, one Henrietta Grundy brought an action by causing to be issued a certain plaint in the County Court of Kent, holden at Gravesend, against one Benjamin Workman Pearce, and afterwards, to wit, on the 9th day of March, 1855, recovered judgment against the said B. W. Pearce; the said County Court of Kent, holden at Gravesend, being then a County Court established under and by virtue of a certain Act made and passed in a session of Parliament holden in the ninth and tenth years of the reign of her present Majesty, intituled "An Act for the more easy recovery of small debts and demands in England." And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the 24th day of January, 1861, and after the said H. Grundy had been married to one Walter Smith, and while the said B. W. Pearce was dwelling and carrying on business in the city of London, to wit, at the "Blue Pig," in St. Mary Axe, and while the judgment hereinbefore mentioned was still unsatisfied, the said H. Grundy, otherwise Smith, obtained a summons

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

in the Sheriff's Court of London, under the provisions of a certain Act of Parliament made and passed in a session of Parliament holden in the fifteenth year of the reign of her present Majesty, intituled, "An Act for the more easy recovery of small debts and demands within the city of London and the Liberties thereof," by which said summons the said B. W. Pearce was required to appear personally in the said Court on the 12th day of February, 1861. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 12th day of February, 1861, the said B. W. Pearce did personally appear in the said Court. And the jurors aforesaid, upon their oath aforesaid, do further present that then and there the Judge of the said Court, Robert Malcolm Kerr, Esq., did amend the said summons by adding thereto the name of the said Walter Smith, the husband of the said H. Grundy, otherwise Smith. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said summons was in due form of law duly adjourned from the said 12th day of February, 1861, to the 14th day of February, 1861. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the said 14th day of February, 1861, the said B. W. Pearce again appeared in person, in pursuance of the said amended summons, so duly adjourned as aforesaid, and was then and there before R. M. Kerr, Esq., then and there being the Judge of the said last-mentioned court, duly and in due form of law, and according to the provisions of the said last-recited Act, examined upon oath, touching the manner and circumstances under which he the said B. W. Pearce contracted the debt for which the said H. Grundy had recovered judgment, on the said 9th March, 1855, in the said County Court of Kent, holden at Gravesend as aforesaid; and the said R. M. Kerr, having then and there full and sufficient power, and being competent to examine the said B. W. Pearce touching the manner and circumstances under which he contracted the said debt, and having full and sufficient power and authority to administer the said oath to the said B. W. Pearce that behalf. And the jurors aforesaid, upon their oath aforesaid, do further present that, at and upon the said examination of the said B. W. Pearce, it became and was a material question and subject of inquiry, whether the said B. W. Pearce had slept with one Catherine Titterton, and whether the said B. W. Pearce ever gave his name as Mr. Titterton, and whether the said B. W. Pearce ever gave half-a-sovereign to one Harriet Crowhurst, and whether the said B. W. Pearce had ever given half-a-sovereign to the said H. Grundy, and whether the said B. W. Pearce ever took a certain bedroom of the said H. Grundy, and whether the said B. W. Pearce was with the said C. Titterton when a certain room was taken from the said H. Grundy, and whether the said B. W. Pearce ever passed more than one night in the house of the said H. Grundy. And the jurors aforesaid, upon their oath aforesaid, do further present, that upon the examination of the said B. W.

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Pearce the said B. W. Pearce was in due manner sworn and did take his corporal oath upon the Holy Gospel of God to speak the truth, the whole truth and nothing but the truth (he the said R. M. Kerr, Esq., then and there having full and competent power and authority to administer the said oath to the said B. W. Pearce in that behalf). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said B. W. Pearce being sworn as aforesaid, but contriving and intending to deceive the said R. M. Kerr touching the manner and circumstances under which the said B. W. Pearce had contracted the said debt for which the said H. Grundy had recovered judgment as aforesaid on the said 9th day of March 1855, in the said County Court of Kent holden at Gravesend, falsely, wickedly, knowingly, wilful and corruptly swore, deposed and gave evidence as follows, to wit: "I (meaning himself the said B. W. Pearce) never slept with Mrs. Titterton (meaning one C. Titterton); I (meaning himself the said B. W. Pearce) never gave my (meaning his the said B. W. Pearce's) name as Mr. Titterton; I (meaning himself the said B. W. Pearce) never gave half-a-sovereign to H. Crowhurst or Mrs. Smith (meaning that he had never given half-a-sovereign to the said H. Grundy or to the said H. Crowhurst); I (meaning himself the said B. W. Pearce) never took the bedroom (meaning a certain bedroom in the house of the said H. Grundy) and sitting-room (meaning a certain sitting-room in the house of the said H. Grundy) of Mrs. Smith (meaning the said H. Grundy) I (meaning himself the said B. W. Pearce) do not know who took it (meaning the said last-mentioned room in the house of the said H. Grundy); I (meaning himself the said B. W. Pearce) was not with Mrs. Titterton (meaning the said C. Titterton) when the room (meaning the said last-mentioned room in the house of the said H. Grundy) was taken; I (meaning himself the said B. W. Pearce) never passed but one night in my life in the house (meaning the said house of the said H. Grundy, at Gravesend aforesaid). Whereas, in truth and in fact, the said B. W. Pearce had slept with the said C. Titterton; and whereas, in truth and in fact, the said B. W. Pearce did give his name as Mr. Titterton; and whereas, in truth and in fact, the said B. W. Pearce did give half-a-sovereign to H. Crowhurst; and whereas in truth and in fact, the said B. W. Pearce did take the said bedroom and sitting-room in the house of the said H. Grundy, and did so from the said H. Grundy; and whereas, in truth and in fact the said B. W. Pearce did know who had taken the said last-mentioned room in the house of the said H. Grundy; and whereas, in truth and in fact, the said B. W. Pearce was with the said C. Titterton at the time the said last-mentioned room was taken in the house of the said H. Grundy; and whereas, in truth and in fact, the said B. W. Pearce did pass more than one night, to wit, three nights, in the house of the said H. Grundy, as he the said B. W. Pearce, at the time he so falsely swore, deposed and gave evidence as aforesaid, well knew. And so the jurors aforesaid

said, upon their oath aforesaid, do say that the said B. W. Pearce, on the 14th day of February, 1861, before the said R. M. Kerr, Esq., so being such Judge as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our Lady the Queen and her laws, contrary to the form of the statute, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

Plea, not guilty.

At the trial before Cockburn, C. J., at the sittings in Middlesex after Michaelmas Term, 1861 (the indictment which was found at the Central Criminal Court having been removed into this Court by *certiorari*) the facts, as set out in the indictment, were proved. A certified copy of a minute of the judgment in the Gravesend County Court was produced, in which Henrietta Grundy was plaintiff and Benjamin W. Pearce defendant. A duplicate of the judgment summons, entitled *Henrietta Grundy v. Pearce*, and issued out of the Sheriffs' Court, London, under sect. 88 of the London (City) Small Debts Extension Act, 1852, was also produced. The judgment summons came on for hearing on the 12th February, 1861, and in consequence of Mrs. Grundy's marriage with Walter Smith since the judgment was obtained R. M. Kerr, Esq., the Judge of the Sheriffs' Court, London, amended the summons by inserting thereon the name of Walter Smith and Henrietta his wife (suing as Henrietta Grundy). The further hearing of the summons was adjourned to the 14th February, when the defendant tendered himself as a witness on his own behalf, was sworn and examined, and committed the perjury assigned in the indictment. The Judge of the Sheriffs' Court ordered the defendant to be committed to prison for forty days for non-payment of the judgment debt and costs, and directed this prosecution to be instituted. At the close of the case for the prosecution, the defendant's counsel, *H. James*, submitted that the Judge of the Sheriffs' Court had no power to make the amendment; that there was no valid summons or case before him; that the proceedings were *coram non judice*, and that consequently the charge of perjury fell to the ground. The learned Judge reserved the point, and the case having gone to the jury the defendant was found Guilty.

A rule *nisi* was obtained to enter the verdict for the defendant pursuant to the leave reserved, or to arrest the judgment.

Sect. 88 of the London (City) Small Debts Extension Act, 1852 (15 Vict. c. 77), is as follows:—

"That it shall be lawful for any party who has obtained a judgment or order in the Court, either under this Act or under the said recited Act, for the payment of any debt or damages, or costs, which judgment or order shall not be satisfied, and for any party who has obtained a judgment or order in any County Court established under or by virtue of the before-mentioned Act

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for the more easy recovery of small debts and demands in England, which last-mentioned judgment or order shall not be satisfied, to obtain a summons from the court in case the party against whom such judgment or order shall have been obtained shall then dwell or carry on business, or have employment within the city of London or the liberties thereof, such summons to be in such form as shall be directed by the rules made for regulating the practice of the court; and it shall be lawful for any party who has obtained any such judgment or order in the court, which said last-mentioned judgment or order shall not be satisfied, to obtain a summons from any County Court established under or by virtue of the last-mentioned Act for the more easy recovery of small debts and demands in England, within the limits of which county the party against whom such last-mentioned judgment or order shall have been obtained shall then dwell or carry on business, such last-mentioned summons to be in such form as shall be directed by the rules made for regulating the practice of the said County Court; which summons (*sic*), as the case may be, are to be respectively served personally upon the person to whom it is directed, requiring him to appear at such time as shall be directed by the said rules, to answer such things as are named in such summons, and if he shall appear in pursuance of such summons he may be examined upon oath touching his estate and effect and the manner and circumstances under which he contracted the debt, or incurred the damages or liability which is or are the subject of the action in which judgment has been obtained against him, and as to the means and expectations he then had, and as to the property and means he still hath of discharging the said debt or damages or liability, and as to the disposal he may have made of any property; and the person obtaining such summons as aforesaid, and all other witnesses whom the judge shall think requisite, may be examined upon oath touching the inquiry authorised to be made as aforesaid, and the costs of such summons and of all proceedings thereon, shall be deemed costs in the cause."

The following of the rules and orders for regulating the practice of the Sheriff's Court of the city of London were referred to during the argument:—

Rule 91. Where the name or description of a plaintiff in the summons is insufficient or incorrect, it may at the hearing be amended at the instance of either party by order of the judge, on such terms as he shall think fit, and thereupon the cause shall proceed, as to set-off and other matters, as if the name or description had been originally such as it appears after the amendment has been made.

Rule 95. Where it appears at the hearing that a less number of persons have been made plaintiffs than by law required, the name of the omitted person may, at the instance of either party, be added by order of the judge on such terms as he shall think fit; and thereupon the cause shall proceed as to set-off as

other matters as if the proper persons had been originally made parties; and if such person shall, either at the hearing, or some adjournment thereof personally, or by writing signed by him or his agent, consent to become a plaintiff in manner aforesaid, the judge shall then pronounce judgment as if such person had originally been made a plaintiff; but if such person shall not consent to become a plaintiff in manner aforesaid, either at the hearing or an adjournment thereof, judgment or nonsuit shall be entered.

Rule 158. Execution on a judgment shall not issue by or against any person not a party to the suit, without a plaint and summons upon the judgment, the proceedings in which shall be the same as in ordinary cases.

Giffard showed cause against the rule.—First, the proceedings were regular, and the judge had power to make the amendment. This was not a proceeding by way of execution in the sense of Rule 158. [WIGHTMAN, J.—There was a judgment in the name of Henrietta Grundy, and the alteration in the names upon the summons was made to enforce that judgment. Was that correct?] Rules 91 and 95 gave the power to amend the summons. [WIGHTMAN, J.—In what cause did the defendant give false evidence?] If the amendment was made without jurisdiction, the defendant was sworn in the cause of *Grundy v. Pearce*. [CROMPTON, J.—We cannot shut our eyes to the fact that this was a proceeding upon a summons in which the husband and wife were parties, and there was no judgment to support that.] The case of *Pennoyer v. Brace* (1 *Ld. Raym.* 244), was then adverted to. [WIGHTMAN, J.—The defendant was not sworn in the original cause.] Secondly, assuming the amendment to have been made erroneously, still the Sheriffs' Court had a general jurisdiction over the matter, and to enter upon the inquiry: (*Reg. v. Millard*, 1 *Dears. C. C.* 166; 6 *Cox. Crim. Cas.* 150). The judgment is good at common law, and everything was regular up to the judgment summons. [COCKBURN, C. J.—The indictment alleges that the perjury was committed under the amended summons: if so, it was *coram non judice*, and the perjury fell to the ground; if it was not so, the allegations in the indictment were not proved.]

H. James, in support of the rule, was not called upon.

COCKBURN, C. J.—I think that this rule should be made absolute. I regret that a man who has been found guilty upon the facts should escape punishment upon a technical point, but the Court is bound to administer the law as they find it. Now, one of the essential requisites in this offence is, that the defendant should commit perjury in a certain cause. In this case the defendant was sworn in a cause that had no existence. A judgment had been recovered by Mrs. Grundy in the Gravesend County Court, which she sought to enforce by a summons in the Sheriffs' Court, London, and in the meantime she had married and become Mrs. Smith. Instead of going to the Gravesend County Court, and making her husband a party to the judgment

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by a *scire facias*, she took out a summons and instituted proceedings in the Sheriffs' Court, London, in her old name. The judge of the Sheriffs' Court improperly amended the summons, and altered it by the addition of the name of "Walter Smith and wife." That alteration was made without jurisdiction. In the cause so altered in name, the defendant was sworn, and committed for perjury. The perjury, therefore, was committed in a cause which had no existence, and the conviction cannot be sustained.

WIGHTMAN, CROMPTON, and MELLOR, JJ. concurred.

Judgment for the defendant.

COURT OF CRIMINAL APPEAL.

January 24, 1863.

(Before ERLE, C.J., BLACKBURN and KEATING, JJ., WILDE, B. and MELLOR, J.)

REG. v. JOHN HASTIE. (a)

Embezzlement—Building society—Secretary—7 & 8 Geo. 4, c. 29, s. 41

By the certified rules of an enrolled benefit building society, mortgages were directed to be made to the trustees, and the redemption-money to be paid to the directors; and it was no part of the secretary's duty, as prescribed by the rules, to receive subscriptions or other moneys for the society. The course of business, however, was that the management of the society was left almost entirely to the secretary, and he frequently received subscriptions. The mortgages were made to the trustees, but when redeemed the money was paid to the secretary for the trustee. The secretary having embezzled the redemption-money upon a mortgage so paid to him:

Held, upon an indictment under the 7 & 8 Geo. 4, c. 27, s. 47, that a jury were warranted upon this evidence in finding that the money was received by virtue of his employment and for his masters.

CASE reserved by Keating, J.

The prisoner was indicted at the special commission at York, on the 22nd December, 1862, for that he, being employed as servant by the Trustees of "The Doncaster Permanent Benefit Building and Investment Society" (naming them), did, as so

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

servant, by virtue of his employment, receive 426*l.* 8*s.* 3*d.*, for and on account of the said trustees, and embezzled the same.

The society, which had been established some fourteen years ago, under the above name, was duly enrolled and its rules certified; a copy of them is annexed for reference, and forms part of the case. Its object was to enable members to obtain from it loans by way of mortgage on their real property, each member contributing 10*s.* annually for fourteen years, and having credit for the amount subscribed on paying off his mortgage.

The prisoner had been secretary to the society from its commencement. He was the only paid officer, and the management of the affairs of the society was left almost entirely to him. The course of business, as prescribed by the rules of the society, had not been strictly adhered to. The subscriptions were not always received by the stewards, but frequently by the prisoner, who also made entries in the stewards' books. The mortgages were always made to the trustees; but when redeemed, the money was paid to the prisoner as secretary, but for and upon receipts signed by the four trustees.

In February, 1860, the prisoner informed the solicitor of the society that John Townend, a member, was about to pay off his mortgage, 426*l.* 8*s.* 3*d.*, and brought the deeds to the solicitor, who thereupon indorsed the usual form of receipt on the mortgage deed, and obtained the signatures to it of the four trustees named in the indictment. On the 13th February, 1860, Townend's solicitor attended at the office of the society's solicitor, got the deeds and receipt, and thereupon paid to the prisoner the sum of 426*l.* 8*s.* 3*d.*, which he embezzled. None of the trustees were present when the money was paid.

It was objected that the prisoner could not be said to be servant to the trustees, nor to have received the money by virtue of his employment as such, inasmuch as his duties, as defined by the certified rules, did not include the receipt of the moneys embezzled.

I was of opinion that the actual course of business as proved, though not in strict accordance with the rules, was evidence for the jury that the prisoner received the money in question by virtue of his employment as servant to the trustees.

The jury found that he did so receive it, and found him Guilty.

I respited the judgment for the opinion of the Court of Criminal Appeal, whether the conviction was right.

H. S. KEATING.

The following rules of the society were referred to in the argument of the prisoner's counsel:—

V. Secretary.

1. The secretary shall attend all meetings of the society and directors at the time named for the commencement of such meetings, or if unable to attend must appoint some other shareholder to the satisfaction of the president or directors to act in his

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stead, and also give a satisfactory reason for his absence, or be fined 5s.

2. He shall enter minutes of all resolutions, transactions, and business of the society in a rough minute-book, the same shall be fairly copied into another, which shall be read to the next meeting; both shall be signed by the president. He shall keep the accounts of the society in a simple and correct manner in books to be provided for the purpose, which books, and also the bank-book, shall produce at each meeting of the society and directors, or pay 5s. for each neglect; he shall also send the circulars and notices, and conduct the correspondence of the society under the direction of the board of directors.

3. He shall call at the society's bankers for the bank-book on the second morning after each subscription meeting, and should the treasurer not have paid in the money received by him he shall immediately give information thereof to the president. He shall also inform the president of anything that may come to his knowledge which may be of advantage or disadvantage to the society.

4. He shall make out an inventory of all securities in the strong-box, and, from time to time, correct copies of such inventory for each of the trustees.

5. He shall assist the auditors to examine the accounts, and shall prepare a report at each half-yearly audit and read the same to the next meeting.

XVIII. Redemption of Mortgages.

3. If any shareholder, having executed a mortgage to this society for money advanced, be desirous to pay off or satisfy the same, he or she shall be at liberty to do so by paying to the directors at once a fine of 10s. per share, together with all the subscriptions that would then become due on the share or shares so advanced up to the end of fourteen years from the date or commencement of the same, and in consideration of such prompt payment, discount at the rate of 5l. per cent. per annum, according to Jones's Tables, shall be allowed, and on the receipt of such future subscriptions, together with all fines and other charges due on the share or shares so paid up, the directors shall order the trustees, at the cost of the owner, to indorse a receipt or acknowledgment on the mortgage, according to 6 & 7 Will. 4, c. 32, s. 5, and therewith to deliver up to the said member all deeds and other documents in their custody relating to the property so released or discharged.

Campbell Foster for the prisoner.—First, the money embezzled was not received by virtue of the prisoner's employment. The offence occurred before the 24 & 25 Vict. c. 96, came into operation, and was under 7 Geo. 4, c. 29, s. 47. This was an enrolled benefit building society under the 6 & 7 Will. 4, c. 32, s. 4; and by the 10 Geo. 4, c. 56, which is incorporated into that Act, the society has power to alter and amend its rules. The amended

rules were enrolled and certified in 1860. The altered rules are made binding on the society: (10 Geo. 4, c. 56, s. 8; 18 & 19 Vict. c. 63, s. 27.) The rules prescribe the duties of the officers of the society, and among them the duties of the secretary. They are in the nature of a statutory enactment. It was no part of the secretary's duty, as prescribed by the rules, to receive money; nor was any one to pay money to him under the rules. And in the present instance money to be paid on the redemption of any mortgage security is, by rule 18, to be paid to the directors whose duty it was to receive the money in question. In *Rex v. Thorley* (1 Moo. C. C. 343), a servant of a carrier employed to look after goods, but not intrusted with the receipt of money, was held not to be within the 7 & 8 Geo. 4, c. 29, s. 47. In that case, as in the present, the party paying handed the money to the servant believing that he had authority to receive it. So in *Rex v. Prince* (Moo. & M. 21), where the prisoner was in the habit of discounting bills for a person, and was indicted under the 52 Geo. 3, c. 63, for unlawfully negotiating and applying to his own use a bill of exchange deposited with him as agent for the owners, it was held that he was not an agent who, in the exercise of his functions, had received a security and afterwards embezzled it within the meaning of that statute.

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ERLE, C. J.—To my mind, the whole question turns on the effect of the course of business in which the prisoner was employed by the society. An employment may be inferred from the course of business as well as from an express contract. In this case it appears that the mortgages were always made to the trustees, but when redeemed the money was always paid to the prisoner in the first instance. That is the evidence.

Foster.—The money is paid in discharge of the security to the society.

WILDE, B.—The employment does not depend on what the prisoner's duties were, but it was a question of fact, what was he employed upon?

Foster.—Secondly, it is submitted that the prisoner did not receive the money on account of his masters.

BLACKBURN, J.—You would not dispute that the society might have employed a clerk to receive this money for them. Then the question still is, was the prisoner employed to receive it for them?

Foster.—In *Reg. v. Harris* (23 L. J. 110, M. C.; 6 Cox. Crim. Cas. 363), where a person was employed to grind corn at the mill in a county gaol, and he embezzled the money paid for some corn sent into him improperly by his superior officer to be ground, it was held that he did not receive the money on account of his masters. So here, the trustees had no right to employ the prisoner to receive the mortgage money. *Rex v. Batty* (2 Moo. C. C. 257), was also cited.

ERLE, C. J.—The case finds that the course of business was, that the mortgages were always made to the trustees, but when

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redeemed the money was always paid to the prisoner on their behalf. That was the course of business, and it was evidence for the jury that he was so employed by the trustees as his master to receive money on their behalf.

Maule (*Hannay* with him) for the prosecution, was not called upon.

ERLE, C. J.—We are all of opinion that the conviction ought to be affirmed.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 24 and 31, 1863.

(Before ERLE, C.J., BLACKBURN and KEATING, JJ., WILDE, B. and MELLOR, J.)

REG. v. GEORGE WALTON and JOSEPH OGDEN. (a)

Demanding property with menaces—Proof of menace—24 & 25 Vict. c. 96, s. 45.

Under the 24 & 25 Vict. c. 96, s. 45, which relates to demanding property, &c., with menaces or by force, the menaces must be of such a nature and extent as to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. It is a question for the jury whether the evidence in any particular case comes within that principle.

CASE reserved for the opinion of this Court by the Chairman of the Sessions for the West Riding of Yorkshire.

The prisoners George Walton and Joseph Ogden were indicted before me at the Intermediate Sessions for the West Riding of Yorkshire, holden at Sheffield on the 8th Dec., 1862.

The following is a copy of the indictment:—

West Riding of Yorkshire } The jurors for our Lady the Queen
to wit. } upon their oath present that Joseph
Ogden and George Walton, on the 2nd day of December in the
year of our Lord 1862, with menaces did feloniously demand
of James Bradshaw the money of him the said James Bradshaw

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

with intent the said money from the said James Bradshaw feloniously to steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown, and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Ogden and George Walton, on the said 2nd day of December in the year of our Lord 1862, five shillings and sixpence in money of the money of James Bradshaw feloniously did steal, take, and carry away against the peace of our Lady the Queen, Her Crown, and dignity, and against the form of the statute in such case made and provided.

The case for the prosecution was that J. Bradshaw was indebted to Thomas Stainforth in the sum of 2l. 7s. 1d. for arrears of rent, and that on the 2nd of December last Benjamin Wilson Stocks, the agent for the said Thomas Stainforth, signed an authority to Samuel Oldfield, a bailiff, to make a distress upon Bradshaw's goods for such sum.

Between 12 and 1 o'clock on the same day John Parkin, clerk to Stocks, took the said authority to the Spread Eagle public house, and there saw John Kilner, Oldfield's deputy. The prisoner Walton, who is also a self-appointed bailiff, was there, and he volunteered to go, and went with Parkin and Kilner to Bradshaw's house, and had the opportunity of seeing the authority.

No distress was made, as Walton and Parkin, who tried the door of Bradshaw's house, found it locked, Kilner being on the opposite side of the road.

The written authority was returned to Oldfield, who gave no instructions or authority to either of the prisoners to proceed in the matter of the said distress.

About half-past three the same afternoon the prisoner Walton went with the prisoner Ogden, who is a self-appointed bailiff also, to Bradshaw's house, and demanded the money owing to Mr. Stainforth, stating that if it was not paid they had a warrant from a magistrate, and would break open the door and make the distress; but that if Bradshaw would pay them five shillings and sixpence for expenses, and sign an I. O. U. for the debt payable to Mr. Stocks, at the rate of one shilling per week, they would be satisfied. One of the prisoners shook the door of the house.

The prosecutor hesitated and Ogden then left for a minute and returned with a policeman. Nothing, however, was said as to what the policeman was to do. The policeman was not told to speak to the prosecutor, and the policeman did not speak to the prosecutor. The policeman had only been told that the prisoners had a distress to make, and were afraid of a disturbance.

After the appearance of the policeman the prosecutor agreed to pay the five shillings and sixpence, and followed the prisoners to a neighbouring dram shop, and there paid them.

The prosecutor believed the prisoners had power and authority to distrain.

It was objected by the counsel for the prisoners that the

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evidence did not show such a menace as is contemplated by the 24 & 25 Vict., c. 96, s. 45, upon which the first count of the indictment was framed, and that the menaces must be of the same nature as if the money had been delivered in consequence of them would have constituted the offence of robbery, and that the evidence showed that the money had been obtained, but did not prove a robbery, and the counsel for the prisoners further contended that the prisoners could not, on the indictment, be convicted of simple larceny, for if any offence was proved it was that of obtaining money by false pretences, and that therefore the indictment was bad.

I overruled the objections, and directed the jury that the words and conduct of the prisoners, if the jury believed the facts, constituted a menace within the meaning of the statute.

The jury said they considered the statement made by the prisoners that they had a warrant signed by a magistrate (which was untrue), supported by their procuring a policeman to give them supposed authority to break into the house, and showing the intent by violently shaking the door, was a menace within the meaning of the Act.

The jury found both prisoners Guilty generally, and I sentenced the prisoners to six months' imprisonment with hard labour, but reserved the question for the opinion of this Court whether the objections to the indictment and conviction were well founded.

WILSON OVEREND,
Chairman.

Jan. 21.—Vernon Blackburn for the prisoner.—This conviction cannot be sustained. The point turns upon the meaning of the words "menaces," in the 24 & 25 Vict. c. 96, s. 45. There is no case reported of a conviction in which the menace was not of violence to the person. Here it is directed to a seizure of the prosecutor's property. In *Roscoe upon Evidence in Criminal Cases* (p. 92, 3rd edit.), it is said: "With regard to the menaces, they must be of the same nature as if the money had been delivered in consequence of them, would have constituted the offence of robbery. In the same manner, the force used must be such as would have been sufficient to render the taking a robbery." Here the money was obtained by the prisoners saying that they had a warrant, and that if the money was not paid they would break open the prosecutor's door and distrain, and the prosecutor believed that the prisoners had authority to distrain. This was more like obtaining money by false pretences, than a demand of money with menaces or by force. It was an endeavour to give greater weight to the false pretence that they had a warrant to distrain: (*Archbold's Criminal Law*, p. 361, edit. 1862.) Secondly, as to the count for larceny:

ERLE, C. J.—Sect. 49, helps you on your way in arguing the point: "It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation, to be caused or made by the offender or by any other person."

Hannay for the prosecution.—Assuming that the menaces should be such as if the money had been delivered in consequence to constitute robbery, still there was sufficient evidence to support the conviction in this case. With respect to “the putting in fear,” which is an ingredient sometimes in the case of robbery, it is treated in 1 *Rus. on Crimes*, 879; first with respect to those cases in which the fear excited has been of injury to the person; secondly, of injury to the property; and thirdly, of injury to the character. (*Brown’s case*, O. B. 1780, *Spencer’s case*, and *Simon’s case* referred to in 1 *Rus. on Crimes*, 881, were then read.)

WILDE, B.—All those cases are threats of the destruction of property.

MELLOR, J.—In the present case the presence of the policeman was likely to allay any fear of personal violence.

Hannay.—Secondly, as to the count for larceny. This was within principle of obtaining money by a fraudulent abuse of legal process, which amounts to larceny: (2 *Rus. on Crimes*, 545.) The instances given there are where a man, intending to steal a horse, takes out a replevin, and having thereby got the horse from the sheriff, rides away. And so also where, by fraudulently delivering an ejectment, and obtaining judgment against the casual ejector, a person gets possession of a house, and takes the goods, intending to steal them. The following authorities were then referred to:—1 *Hawk. P. C. c. 33, s. 12*; 2 *East’s P. C. c. 16, s. 96*; *Rex v. Newland*, 2 *Leech C. C. 721*; *Reg. v. Norton*, 8 *Car. & P. 671*. The present case is similar to the cases where money has been obtained by ring dropping, which amounts to larceny: (*Rex v. Watson*, 2 *Leech*, 640.)

BLACKBURN, J.—That class of cases turns on the point that the property has not been parted with.

Vernon Blackburn, in reply.—All the cases quoted in support of a conviction upon the first count are cases of threats of injury to the person, or of the destruction of property. Here the threat was only of putting legal process in force, and the prosecutor parted with his property under that false pretence.

Cur. adv. vult.

Jan. 31.—WILDE, B.—The question in this case turns upon the proper construction of the 24 & 25 *Vict. c. 96, s. 45*. The section is in these words: “Whosoever shall, with menaces or by force, demand any property, chattel, money, valuable security, or other valuable thing of any person with intent to steal the same shall be guilty of felony,” &c. There are many demands for money or property accompanied by menaces or threats which are obviously not criminal, nor intended to be made so. Thus, in a case of disputed title to personal property, a man may threaten his opponent with personal violence, if he does not relinquish the subject of dispute, and he would not be within the intention of this statute. Other instances would offer themselves upon a little consideration. Where then is the proper limit to the operation

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of this section? It is to be found in the words "with intent to steal." Nothing is said about "violence" in conjunction with menaces, still less of violence to the person, as distinct from violence to property. There is no express limit except in the words "with intent to steal." Now, a demand of money, with intent to steal, if successful, must amount to stealing. It is impossible to imagine a demand for money with intent to steal and the money obtained upon that demand, and yet no stealing. The question then arises, what are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing. It is said in 2 East, p. 555, c. 26, s. 3, "The taking in all cases must be against or without the consent of the owners to constitute larceny or robbery." On the other hand it is said, at the same place, "A colourable gift which in truth is extorted by fear, amounts to a taking and trespass." These two passages of the learned writer, when taken together, appear to define the offence of stealing in the case of menaces. For if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. And, accordingly, in the cases cited in argument, the threatened violence, whether to person or property, was of a character to produce, in a reasonable man, some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts the element of free, voluntary action which alone constitutes consent. Now to apply this principle to the present case. A threat or menace to execute a distress warrant is not necessarily of a character to excite either fear or alarm. On the other hand, the menace may be made with such gesture and demeanor, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect. And this should be decided by the jury. Now in this case there was evidence very proper to be left to the jury to raise the above question. But the Chairman left no such question to them, and directed them, as a matter of law, that the conduct of the prisoners, if believed, constituted a menace within the statute.

Our judgment that this conviction cannot be sustained is founded entirely on this ground.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

*January 24 and 31 1863.***(Before ERLE, C.J., BLACKBURN and KEATING, JJ., WILDE, B., and MELLOR, J.)****REG. v. R. J. FRANKLAND. (a)***Indictment—Partners—Joint Stock Company—Corporation.*

The prisoner was indicted for embezzling the money of T. B. and others his masters, and the evidence was that T. B. was a partner in a company of more than twenty persons, some being called directors and others shareholders, and that they called themselves "The R. M. and H. Coal Company, Limited," which name was painted over the office door, and that the shares were transferable without the consent of the other partners, and that a share ledger was kept. There was no formal proof of the Company being registered under the Joint Stock Companies Act, or of its being a corporation. Held, that the indictment properly laid the money as belonging to T. B. and others.

THE following case was reserved by the Chairman of the West Riding Intermediate Sessions, held at Sheffield, on the 8th December, 1862, for the opinion of this Court:—

The prisoner, Richard John Frankland, was tried before me at the Intermediate Sessions for the West Riding of Yorkshire, held at Sheffield on the 8th December, 1862, upon an indictment framed on the 68th, 71st, and 72nd sections of the Larceny Act (the 24 & 25 Vict. c. 96), on a charge of feloniously embezzling three several sums of 10*l.*, 6*l.* 10*s.*, and 6*l.* 13*s.*, within the space of six months, while employed as a clerk, from Thomas Bolland and others, his masters.

The first witness called on behalf of the prosecution, Philip Cooper, proved, in his examination in chief, that he was the manager of the Rotherham, Masbro', and Holmes Coal Company, "Limited," that T. Bolland was one of the partners in that company, and that there were several other partners.

The prisoner's counsel objected to the last question, and the answer elicited, on the ground that the names of the partners, and whether more than two, would appear from the partnership deed of the company.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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I overruled the objection, and the question and answer were admitted.

The prisoner's duties were, as secretary and cashier of the company, to receive all the moneys for the coals sold, and enter them in the cash book, and account for them. In September last the witness examined his accounts, and spoke to the prisoner about them, and told him he had received moneys which he had not accounted for, and had sold coals and not given receipts. He said he was very seriously wrong in his coal accounts, and that he had received several sums which he had not accounted for, and the witness recommended him to give an account of them. He then made out an account of sums which he had received, amounting to 201*l.* 5*s.* 5*d.*, which he said was correct, so far as he could recollect; but there were still some other sums which he could not account for. He said he was very sorry for what he had done, and would be very glad to give every assistance in unravelling the account.

Ten days afterwards he handed in another account of money received by him and not accounted for, which, with the first account, amounted to 448*l.* 12*s.* He said he had spent a good deal in postage stamps and travelling expenses, and on the same day he handed in an account for disbursements amounting to 109*l.* 19*s.* 1*d.*

The prisoner's cash-book did not contain a sum of 10*l.* paid to Ann Askham, on the 18th June; 6*l.* 10*s.*, paid by Henry Bramble on the 30th June; and 6*l.* 13*s.*, paid by Ann Askham, on the 15th July.

On his examination the witness said there were a number of shareholders in the company, and directors were appointed. The witness was appointed manager. The directors appointed the officers of the company by resolutions, which were recorded in a minute book of the company. After the rendering of his first account the prisoner was suspended by a resolution of the directors. He had access to the books afterwards to enable him to make out his second statement of accounts. His duties were to have charge of all accounts, to receive all moneys, to enter the transfer of shares, and fill in the share certificates. The directors made an annual report to the shareholders, and the prisoner drew up the financial part of it. He had charge of the mines over the ground, and he sought for orders for coal one day every week at Sheffield. He had to pay the workmen their wages, and had to calculate their allowances, and was the only traveller the company had. He was the factotum of the company. His salary was 100*l.* per year, and a house and coals and candles. Since he had left the service of the company two officers had been appointed in his place, one at a salary of 80*l.*, and the other at a salary of 130*l.*, and the witness now acted as secretary and clerk. The prisoner also kept the share ledger. There was painted over the office door of the company, "The Rotherham, Masbro', and Holmes Coal Company, 'Limited,'" the word "Limited" being between inverted commas.

On this evidence, the counsel for the prisoner objected that a Court of Quarter Sessions had no jurisdiction to try the offence, and that the indictment was erroneous. That the evidence in chief of Mr. Cooper established, that the prisoner was cashier and secretary of the Rotherham, Masbro', and Holmes Coal Company, "Limited," of which Mr. Cooper was the manager, and the cross-examination had elicited that there were eighty shareholders or partners, and also directors of this company. That the officers of the company were appointed and suspended by resolution of the directors, entered in their minute books. That shares in the company were transferred by certificates, and that a share ledger was kept. This was not therefore a private partnership of which the prisoner was clerk or servant, but a corporate body or public company, of which the prisoner was secretary or public officer.

In support of this view the Joint Stock Companies Acts, 1856 and 1857, were referred to. If so, the offence committed by the prisoner was a misdemeanor under the 81st or 82nd section of the Larceny Act, and by the 87th section of the same Act it could not be tried at Quarter Sessions.

It was answered by the counsel for the prosecution, that the assumption by a coal company, of the name or style of The Rotherham, Masbro', and Holmes Coal Company, "Limited," proved nothing. That T. Bolland, being one of several partners, the moneys embezzled were properly laid as being the moneys of him and others. That sections 81 and 82 of the Larceny Act referred to and applied to a class of offences entirely different from that before the court, and that there was no evidence, by certificate of incorporation or otherwise, to satisfy the court that the coal company had taken advantage of, and was within the meaning of the Joint Stock Companies Acts, 1856 and 1857, and had become a body corporate or public company within the meaning of those Acts.

I overruled the objection on the ground that there was no sufficient evidence before me to establish that this was a body corporate or public company.

John Farnall Askham then proved, that on the 18th June the prisoner called at his house for an account, due to the Rotherham, Masbro', and Holmes Coal Company, and his wife paid him 10*l.*: he also called on the 15th July for a further account of 6*l.* 13*s.*, which his wife paid him.

The prisoner receipted the bills, which were handed in and read. They were headed Mr. J. F. Askham, Sheffield, Dr. to the Rotherham, Masbro', and Holmes Coal Company, "Limited."

Henry Bray proved, that on the 30th June he paid the prisoner 6*l.* 10*s.* for coals, and took his receipt, which was handed in, and was headed in the same manner as the last. He did not know of any firm of Thomas Bolland and others, by that name, and had never dealt with them.

This was the case for the prosecution. The prisoner's counsel objected that the proof of the persons for and on account of whom

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the moneys alleged to be embezzled had been received by the prisoner varied from the allegation in the indictment, and that unless the indictment was amended, the variance was fatal and the indictment bad. The indictment alleged the prisoner to be employed as clerk to Thomas Bolland and others, and that when so employed he received the sums proved, for and on account of the said T. Bolland and others, his masters, and embezzled the same; whereas the receipts put in, signed by the prisoner, of the sums said to be embezzled, were sums received by him, as appeared by the evidence and the heading of the receipts for and on account of the Rotherham, Masbro', and Holmes Coal Company, "Limited." Neither was there any proof that the prisoner was either clerk or servant to T. Bolland and others.

I put it to the counsel for the prosecution whether on that objection they would amend the indictment by inserting the name of the Rotherham, Masbro', and Holmes Coal Company, "Limited," in the place of "Thomas Bolland and others," under the 14 & Vict. c. 100, s. 1; but the counsel for the prosecution replied that there was nothing to amend by or to show that the prisoner was not properly described as the clerk of Thomas Bolland and others, and that the moneys embezzled laid as their moneys, and therefore declined to amend.

I then overruled the objection, and held the indictment to be sufficiently supported by the evidence, subject to a case for the opinion of the Court of Criminal Appeal.

The counsel for the prisoner then addressed the jury on that facts, contending that the evidence did not support the indictment.

I directed the jury that the sufficiency of the indictment was for me to decide, and that if they found on the evidence that the prisoner had received these sums for and on account of his employers as clerk, and had appropriated them to his own use, they ought to find him guilty on this indictment; if they had any doubt, to give him the benefit of it.

The jury found the prisoner Guilty, with a recommendation of mercy.

The Court sentenced him to be imprisoned twelve calendar months with hard labour, subject to the opinion of the Court of Criminal Appeal whether I was right in overruling the objection raised on behalf of the prisoner, and whether on the above facts the conviction could be sustained.

WILSON OVEREND, Chairman.

Jan. 24.—*Campbell Foster* for the prisoner.—The conviction ought not to be sustained. The sessions were wrong in receiving evidence that Thomas Bolland was one of several partners. The word "Limited" attached to the name of a joint stock company is a statutable title. The proper evidence of the name of the partnership was the deed of settlement, and it would also have shown that the company was a corporation. By the Joint Stock Companies Act (19 & 20 Vict. c. 47, s. 113), upon

compliance with the requisitions of the Act, the Registrar of Joint Stock Companies is to certify that the company is incorporated, and that it is limited, and thereupon the company "shall be incorporated accordingly." By sect. 4, all trading partnerships exceeding twenty persons are to be registered under the Act, unless constituted by private Act of Parliament or charter. [MELLOR, J.—What was there to show that the prosecutors were not partners, although not invested with the privileges conferred by the Joint Stock Companies Acts?] The word "Limited" was painted over the office door. [BLACKBURN, J.—That is proof that they held themselves out as a company completely registered, but not that they were completely registered.] Sects. 5 and 13 require such companies to insert the word "limited" at the end of the name of the company. (Taylor on Evidence s. 288, 289, was then referred to.) Secondly, the cross-examination showed the existence of an incorporated company. [WILDE, B.—Was it not necessary to show that it was a corporation by the certificate of registration?]

The learned counsel then cited *Count Durose's* case (1 East. P. C. 415).

No counsel appeared for the prosecution.

Cur. adv. vult.

Jan. 31.—ERLE, C. J.—In this case the prisoner was convicted of embezzling the money of Thomas Bolland and others, and we think that the facts are sufficient to support the conviction, and that the objections made at the argument were then answered, with one exception, viz., that there was evidence which ought to have been left to the jury to show that the Rotherham Coal Company, Limited, was a corporation. It appears that Bolland and others carried on business under the name of the Rotherham, Masbro', and Holmes Coal Company, Limited. Some members of the company were called directors and others shareholders, and the number of members had far exceeded twenty. The name of the company was over the door. The shares were transferable, without the consent of the other shareholders, and a minute book for resolutions was kept. It was contended that these were compliances with the requirements of the Joint Stock Companies Act (7 & 8 Vict. c. 110), and so were indications on which the jury might find that the company was registered according to that Act, and so incorporated. It was contended further, that the number of shareholders and the transfer of shares were in violation of that Act, if it was not registered, and that the presumption was against illegality, and that all this was for the jury. The answer is that a mining company on the cost book principle is declared to be lawful by the same statute, and that such a company might lawfully do all that was supposed to be unlawful under that statute, and we refer to the authorities and arguments in Mr. Wordworth's book on Joint Stock Companies (p. 193) to show that colliery companies in any county in England may lawfully be carried on, with-

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out registration, on the cost book principle. A further answer that the prisoner alleges that registration exists. If so, it must be in writing, and, as a general rule, the party who claims to put the contents of a writing in evidence must produce it, or account for its absence. This the prisoner does not do. If he offered testimony of a witness who said either that he had seen the register, or that he had heard the prosecutors say that it existed, the evidence would be rejected on the principle above mentioned. If the witnesses are inadmissible, equally (as far as the application of that principle is concerned) are actions offered as secondary evidence of the existence of a writing. It should be noted that if the company is incorporated it must be by a writing under the statute, made within a few years past, and that a trading corporation under this statute differs from a corporation for public purposes, and from a corporation by prescription; so that evidence admissible to prove the existence of such corporations as were last mentioned would not be necessarily admissible to prove a modern charter or a recent registration. In this case we see no reason for taking it out of the operation of the general principle. It should be noted also that a company intending to be registered may fail to fulfil some of the conditions required for a valid registration, and though they would violate the Joint Stock Companies Act by carrying on business without registration, the directors and shareholders would not lose their legal rights as owners of property, neither would they be placed out of the protection of the law because the imperfect registration failed to make them a corporation. For these reasons I am of opinion that there was no evidence which ought to have been admitted to the jury that the company was incorporated.

BLACKBURN, J.—In this case I yield to the authority of the four Brothers, and join in their judgment; but I think it necessary to say that I do not agree in their reasoning, which I think might in other cases, lead to conclusions which, as at present advised, I think not law. In the present case the question is whether Thomas Bolland and others were the employers of the prisoner. There was sufficient evidence to support a verdict for the Crown, but I wish to guard against it being supposed that whenever individuals are shown to share the profits of a trading body carrying on business under a name, *e. g.*, "Peninsula and Oriental Steam Packet Company" (a matter which might always be proved as to the shareholders in a corporation), I say I wish to guard against being supposed to agree that on such evidence being given in a suit between third parties, the jury should be directed, as a matter of law, that they must find that the individuals are partners in a firm of that name, unless a charter under seal, or some other conclusive proof to the contrary, is produced.

Conviction affirmed

VICE-CHANCELLOR STUART'S COURT.

*January 16, 1863.**Re SAUNDERS'S ESTATE.**SAUNDERS v. WARTON.**Felony—Voluntary settlement previous to conviction—Forfeiture.**A. S., after committing certain felonious acts, but before his apprehension and conviction, executed a voluntary settlement of personal estate in favour of his wife and children :**Held, that the settlement, having been executed with an intention to defeat the rights of the Crown, was void.*

THE question in this case was as to the validity, as against the Crown, of a voluntary settlement of personalty made by a felon between the commission of a felony and his conviction for the same.

By an indenture dated 23rd May, 1861, made between Alfred Saunders of the one part, and the said John Browning and William Jones, of the other part, the said A. Saunders assigned to the said Browning and Jones all his interest under the will of his father (who died in 1860) upon trust, immediately upon the receipt of the same, to invest the same in Government or real securities in Victoria, and pay the interest, dividends, and annual proceeds to his wife for life, and after her decease for his children absolutely as therein mentioned.

At the date of this deed Alfred Saunders was residing at Melbourne, in Australia.

On the 8th June, 1861, Alfred Saunders was taken into custody, and on the 21st June, 1861, he was convicted of embezzlement, and sentenced to imprisonment. By the law of Victoria, embezzlement is felony.

The trustees of the settlement now presented a petition for the payment to them of the share now standing in court to the credit of "the account of the plaintiff, Alfred Saunders, or the parties entitled." The suit in which Alfred Saunders was plaintiff was a suit for the administration of the estate of the father.

It appeared that the acts of embezzlement in respect of which A. Saunders was convicted were committed in November and December, 1860.

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The petition contained the following statement:—"I his conviction or apprehension the said Alfred Saunders and proposed to the corporation of Melbourne, who subsequently arrested and prosecuted him, that upon receiving the coming to him in this suit, he would pay and make good moneys which had been used or appropriated by him before the corporation."

Greene, Q. C., and *Talfourd Salter* (of the common law) appeared for the petitioners.

Wichens, for the Crown, claimed the fund, as being forfeited by the conviction. He cited *Morewood v. Wilkes* (6 Carr. & 1

The VICE-CHANCELLOR.—The question is, whether the settlement of the 23rd May was executed in order to defeat the claim of the Crown to the personal property of the felon. If the date mentioned in the indictment is correct, the act of felony was committed before the execution of the deed. It has been held that the date in the indictment was immaterial; and that a prisoner might be convicted on any act committed before the date mentioned in the indictment. It may be in a sense immaterial; but only in the sense that the date might have been shown to be false by those who allege the contrary. I think the date mentioned in the indictment must be taken as *facie* evidence of the true date of the act. The petition states an offer to pay the money, which must have been made before the settlement; I assume, therefore, that the acts mentioned were before the date of the settlement; and if the settlement was executed in apprehension of a conviction, it was fraudulent. The petition must be dismissed so far as it relates to the payment of the fund in court to the trustees of the settlement of the 23rd May, 1861, and it must be declared that that settlement is invalid. The costs of all parties to come out of the pockets of the court, and the balance to be transferred to the Solicitor-General, Treasury and the Assistant Paymaster for the time being.

CENTRAL CRIMINAL COURT.

May 15, 1862.

(Before Mr. JUSTICE WILLES.)

REG. v. BROWN. (a)

Forgery—Solicitor for prisoner—Privilege.

A solicitor for the prisoner is bound to produce a document when the prisoner is charged with an offence in respect of such document.

THOMAS HENRY JOHNSON BROWN was charged with forging and uttering a receipt for 6*l.*, with intent to defraud. *Sleigh* and *Giffard* for the prosecution.

The prisoner was indicted for forgery, and it appeared that in March last he had preferred a charge of forgery against a man of the name of Brittain. To conduct the prosecution in that case a gentleman, now called as a witness for the present prosecution, had been retained, John Abrahams, who said—I have been served with a subpoena *duces tecum* to produce certain documents; but they came into my possession as solicitor for the prosecution in *Reg. v. Brittain*, in which case I was retained by him as solicitor for the prosecution.

WILLES, J.—What do you say to that, Mr. *Sleigh*?

Sleigh.—A solicitor cannot refuse to produce documents deposited with him by a person charged with an offence in respect of such documents, otherwise justice might be defeated. Take the case of a person who, having forged an instrument, upon detection places it in his attorney's hands. Were the privilege here sought to be established granted, conviction might be impossible, by reason of the non-production of the forged documents.

WILLES, J.—I think the documents must be produced.

The prisoner was undefended.

Guilty.

CENTRAL CRIMINAL COURT.

January 7, 1863.

(Before the COMMON SERGEANT.)

REG. v. GOVER. (a)

*Coinage offence—24 & 25 Vict. c. 99, s. 21.**A galvanic battery is a machine within the meaning of the Act.*

LOUIS GOVER was indicted for feloniously having in possession two galvanic batteries for the making of counterfeit coin.

John Clerk and Poland for the prosecution.

Lilley for the prisoner.

The 24th section of the 24 & 25 Vict. c. 99, enacts that Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused) shall knowingly make, mend, or begin or proceed to make or mend, or buy or sell, have in his custody or possession, any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make and impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or part of both or either of such sides, or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging or other tool, collar instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

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Coinage offence.

The facts of the case were as follows:—

On the 6th of December, Brannan, a police constable, employed by the Mint, went to the house of the prisoner, and in a room admitted to be occupied by him, found ladles with white metal in them, files with metal in their teeth, a basin with sand and water in it, a bag containing plaster of Paris, bottles containing acid, clamps for holding a mould while the metal is poured in, a piece of antimony, and a get, that forms the channel of the mould when the metal is poured in, and two galvanic batteries.

He showed these articles to the prisoner, who said "they are not coining instruments." No counterfeit coin was found, and at the trial a card, purporting to be a business card of the prisoner, wherein he described himself as an "electro-plater to the trade," was produced by his counsel.

Mr. Webster, Inspector of Coin to the Mint, proved that counterfeit coin is invariably electro-plated before it is put into circulation, that antimony is mixed with the other metals to make the coin sound better, files for finishing the coin, and that sand and water is used to take away the brightness after the coin is finished. He also stated that electro-plating generally was done by the aid of galvanic batteries.

Lilley, for the prisoner, contended that the word *machine*, as used in the Act, must be taken to mean a machine used for the purposes expressed by the Act, as a *press for coinage, cutting engine, or any other contrivance, for cutting blanks out of gold, silver, or other metal or mixture of metals*. The words "*or any other machine*" followed immediately in that sentence, and could apply only to a variety of machine used for the purposes mentioned. Electro-plating, as applied to coinage, was not mentioned in any way, and from the care with which all other instruments of coining were specified in the Act, it was an omission that could not in this case be supplied.

The COMMON SERGEANT, having consulted Mr. Justice Keating, ruled that, upon the evidence, the galvanic batteries were *machines* within the meaning of the Act, and refused to reserve the point.

CENTRAL CRIMINAL COURT.

October 30, 1862.

(Before Mr. Baron MARTIN.)

REG. v. BRAUN and KORTOSKE. (a)

Bankruptcy—Indictment—Election.

Indictment contained many counts charging various misdemeanors amongst them counts for conspiracy. There being evidence to the jury upon the conspiracy only, Prosecution made to elect upon which count the case shall be left to jury.

DAVID BRAUN and Benjamin Kortoske were charged with unlawfully, after being adjudged bankrupts, willfully falsifying their books with intent to defraud. There were other counts for conspiring together, and with other persons, with a view to defraud.

Ballantine, Serjt., Sargood, and Metcalfe for the prosecution; Collier, Q.C., Giffard, and F. H. Lewis for the defendants.

The indictment was as follows:—

Central Criminal Court } The jurors for our Lady the Queen upon oath present, that before and at the time committing the offences hereinafter mentioned, to wit, on the first day of January, in the year of our Lord One thousand eight hundred and sixty-one, and between that time and the committing the offences hereinafter mentioned, David Braun and Benjamin Kortoske were partners in trade, and that (to wit), on the third day of September, in the year of our Lord One thousand eight hundred and sixty-one, they committed an act of bankruptcy, and that (to wit), on the thirteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, said David Braun and Benjamin Kortoske were partners in trade, were duly adjudged and declared bankrupts by the Court of Bankruptcy in Basinghall-street, in the city of London, and that the said David Braun and Benjamin Kortoske did, after the said act of bankruptcy committed, and within the jurisdiction of the Central Criminal Court, wilfully and unlawfully, with intent to defraud their creditors, alter and falsify divers of their books and writings, contrary to the form of the statute in such case made.

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

Second count.—And the jurors aforesaid, upon their oath aforesaid, further present that afterwards (to wit), on the fifteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, after such act of bankruptcy committed, wilfully and unlawfully, and with intent to defraud their creditors, did make divers false and fraudulent entries in divers books of accounts against the form of the statute in such case made.

Third count.—And the jurors aforesaid, upon their oath aforesaid, further present that afterwards (to wit), on the said fifteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, in contemplation of bankruptcy, did wilfully and unlawfully, and with intent to defraud their creditors, alter and falsify certain books and writings of and belonging to them, against the form of the statute in such case made.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, further present that afterwards (to wit), on the said fifteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, in contemplation of bankruptcy, did wilfully and unlawfully, with intent to defraud their creditors, make false and fraudulent entries in divers books of account, against the form of the statute in such case made.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, further present that afterwards (to wit), on the said fifteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, with intent to defeat the law relating to bankrupts, did wilfully and unlawfully, and with intent to defraud their creditors, alter and falsify divers of their books and writings, against the form of the statute in such case made.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards (to wit), on the day and year aforesaid, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, with intent to defeat the law relating to bankrupts, did wilfully and unlawfully, and with intent to defraud their creditors, make certain false and fraudulent entries in their books of account, contrary to the form of the statute in such case made.

Seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards (to wit), on the said fifteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, so being adjudged bankrupts as aforesaid, did wilfully and unlawfully, with intent to defeat the objects of the law of bankruptcy, and to defraud and defeat the rights of their creditors, make divers false and fraudulent entries or statements in the books and writings relating to their property, trade, dealings, and affairs against the form of the statute in such case made.

Eight count.—And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards (to wit), on the said fifteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, so being adjudged bankrupts as

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aforesaid, did wilfully and unlawfully, with intent to defeat the obj of the law of bankruptcy, and to defraud and defeat the rights of t creditors, make divers false and fraudulent omissions from the books writings relating to their property, trade, dealings, and affairs agt the form of the statute in such case made.

Ninth count.—And the jurors aforesaid, upon their oath aforesaid further present that within three months next before the date of said David Braun and Benjamin Kortoske being adjudged bankrupt aforesaid (to wit), on the fifteenth day of October, in the year of Lord One thousand eight hundred and sixty-one, and within the j diction of the Central Criminal Court, the said David Braun Benjamin Kortoske did wilfully and unlawfully, with intent to con the state of their affairs, and to defraud and defeat the rights of t creditors, alter and falsify divers books and writings relating to t property, trade, dealings, and affairs, against the form of the statut such case made.

Tenth count.—And the jurors aforesaid, upon their oath aforesaid further present that within three months next before the date of said David Braun and Benjamin Kortoske being adjudged bankr as aforesaid (to wit), on the said fifteenth day of October, in the of our Lord One thousand eight hundred and sixty-one, and within jurisdiction of the Central Criminal Court, the said David Braun Benjamin Kortoske did wilfully and unlawfully, with intent to con the state of their affairs, and to defraud and defeat the rights of t creditors, make divers false and fraudulent entries and statements in books and writings relating to their property, trade, dealings, and af against the form of the statute in such case made.

Eleventh count.—And the jurors aforesaid, upon their oath afores do further present that within three months next before the date of said David Braun and Benjamin Kortoske being adjudged bankrupt aforesaid (to wit), on the fifteenth day of October in the year of I One thousand eight hundred and sixty-one, and within the jurisdic of the Central Criminal Court, the said David Braun aud Benja Kortoske did wilfully and unlawfully, with intent to conceal the stat their affairs, and to defraud and defeat the rights of their creditors, m divers false and fraudulent omissions from the books and writi relating to their property, trade, dealings, and affairs, against the form the statute in such case made.

Twelfth count.—And the jurors aforesaid, upon their oath afores do further present that within three months next before the date of said David Braun and Benjamin Kortoske, being adjudged bankr as aforesaid (to wit), on the said fifteenth day of October in the year of Lord One thousand eight hundred and sixty-one, and within the ju diction of the Central Criminal Court, the said David Braun and Benja Kortoske did wilfully and unlawfully, with intent to defeat the obj of the law of bankruptcy, and to defraud and defeat the rights of t creditors, alter and falsify divers books and writings relating to t property, trade, dealings, and affairs, against the form of the statut such case made.

Thirteenth count.—And the jurors aforesaid, upon their oath af said, do further present that within three months next before the date the said David Braun and Benjamin Kortoske, being adjudged ba rupts as aforesaid (to wit) on the said fifteenth day of October, in year of our Lord one thousand eight hundred and sixty-one, and wit

the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske did wilfully and unlawfully, with intent to defeat the objects of the law of bankruptcy, and to defraud and defeat the rights of their creditors, make divers false and fraudulent entries and statements in the books and writings relating to their property, trade, dealings, and affairs, against the form of the statute in such case made.

Fourteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that within three months next before the date of the said David Braun and Benjamin Kortoske, being adjudged bankrupts as aforesaid (to wit), on the said fifteenth day of October, in the year of our Lord One thousand eight hundred and sixty one, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske did wilfully, wickedly, and unlawfully, with intent to defeat the objects of the law of bankruptcy and to defraud and defeat the rights of their creditors, make divers false and fraudulent omissions from the books and writings relating to their property, trade, dealings, and affairs, against the form of the statute in such case made.

Fifteenth count.—And the jurors aforesaid, upon their oaths aforesaid, do further present that within sixty days next before the date of the said David Braun and Benjamin Kortoske, being adjudged bankrupts as aforesaid (to wit) on the said fifteenth day of October, One thousand eight hundred and sixty-one, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske unlawfully did remove, conceal, and embezzle a certain part of their property, to the value of ten pounds and upwards, that is to say, five thousand precious stones, of the value of nine hundred and fifty pounds; fifty bales of silk, of the value of five hundred pounds; two thousand yards of woollen cloth, of the value of four hundred pounds; twelve pieces of calico, of the value of one hundred pounds; four hundred pieces of print, of the value of four hundred pounds; and one thousand yards of carpet, of the value of one hundred and fifty pounds, with intent to defraud and to defeat the rights of the creditors of them the said David Braun and Benjamin Kortoske, and against the form of the statute in such case made.

Sixteenth count.—And the jurors aforesaid, upon their oaths aforesaid, do further present that before and at the time of committing the offence hereinafter mentioned (to wit) on the thirteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, the said David Braun and Benjamin Kortoske were adjudged bankrupts as aforesaid, and afterwards, and within the time limited by law in that behalf (to wit) on the day and year aforesaid, the said David Braun and Benjamin Kortoske surrendered themselves respectively to the Court of Bankruptcy in Basinghall-street, in the city of London, and there duly made the declaration required by the statute respectively, and then submitted themselves respectively to be examined before the said Court, and that the said David Braun and Benjamin Kortoske then, upon their said examinations respectively, wilfully and unlawfully, with intent to defraud and defeat the rights of their creditors, did not fully and truly discover to the best of their knowledge and belief, all their personal property, but on the contrary, made false statement as to several credits for debts due and owing to their estate, that is to say, a debt of thirteen pounds seventeen shillings and two-pence, owing by one Henry Calisher; a debt of seven hundred and eighty-five pounds, owing by one Keoy-niki Williams; a debt of one hundred and sixty-four pounds

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owing by one Harris Tallernan; a debt of one hundred and thirteen pounds one shilling and five-pence, owing by one H Morris; and a debt of fourteen pounds nine shillings, owing by two brothers of the name of Jones, and certain large quantities of merchandize and precious stones, that is to say, twelve pieces of calico, fourteen bales of silk, one thousand yards of carpet, four hundred pieces of print, two thousand yards of woollen cloth, and seven thousand garnet stones, and divers other goods and chattels to the value of forty thousand pounds, and did not fully and truly discover how and to whom, and for what consideration, and when they disposed of, assigned, or transferred the same, the same not having been really and *bonâ fide* before then sold or disposed of in the way of their trade or business, or laid out in the ordinary expenses of their families respectively, against the form of the statute in that case made.

Seventeenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said David Braun and Benjamin Kortoske on the seventeenth day of August, in the year of our Lord One thousand eight hundred and sixty-one, unlawfully, knowingly, and designedly did falsely pretend to one John Hart, then being the agent and salesman of one George Wilcock, that the said David Braun and Benjamin Kortoske had contracted with a merchant, then carrying on business as an exporter of goods to the East Indies, to sell to him, and that he wanted to buy for that purpose, large quantities of goods (to wit), two thousand yards of woollen cloth, and also did then and there falsely pretend to the said John Hart, so being such agent and salesman as aforesaid, that they the said David Braun and Benjamin Kortoske had sold two thousand yards of woollen cloth to a merchant then carrying on business as an exporter of goods to the East Indies, and also did then and there falsely pretend to the said John Hart, so being such agent and salesman as aforesaid, that they the said David Braun and Benjamin Kortoske required two thousand yards of woollen cloth to be delivered to them in London, within the four days next ensuing, for immediate shipment to the East Indies, and also did then and there falsely pretend to the said John Hart, then being such agent and salesman as aforesaid, that they the said David Braun and Benjamin Kortoske required two thousand yards of woollen cloth to be shipped on board a vessel, which was appointed to sail for the East Indies on the following Monday or Tuesday, and also did then and there falsely pretend to the said John Hart, then being such agent and salesman as aforesaid, that they the said David Braun and Benjamin Kortoske had arranged to have two thousand yards of woollen cloth, tilleted or packed in extra coverings for immediate shipment to the East Indies, by means of which said false pretences the said David Braun and Benjamin Kortoske did then unlawfully obtain from the said George Willcock large quantities of goods (to wit), two thousand yards of woollen cloth, of the value of four hundred and three pounds of the goods of the said George Willcock, with intent to defraud; whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, contracted with a merchant, then carrying on business as an exporter of goods to the East Indies, to sell to him and did not want to buy for that purpose, large quantities of goods (to wit), two thousand yards of woollen cloth; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, sold two thousand yards of woollen cloth to a merchant,

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APPENDIX.

STATUTES.

- An Act to amend the Law relating to the giving of Aid to Discharged Prisoners
- An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estates
- An Act to amend “The Merchant Shipping Act, 1854,” “The Merchant Shipping Act Amendment Act, 1855,” and “The Customs Consolidation Act, 1853”
- An Act for the Better Protection of Her Majesty’s Naval and Victualling Stores
- An Act for the more speedy Trial of certain Homicides committed by persons subject to the Mutiny Act
- An Act for obtaining a Declaration of Title
- An Act to amend the Law relating to the Fraudulent marking of Merchandise x
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- An Act to give greater Facilities for summoning Persons to serve on Juries, and for other Purposes relating thereto

then carrying on business as an exporter of goods to the East Indies ; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske did not, nor did either of them, require two thousand yards of woollen cloth to be delivered to them in London within four days then next ensuing, for immediate shipment to the East Indies or elsewhere : and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske did not, nor did either of them, require two thousand yards of woollen cloth to be shipped on board a vessel which was appointed to sail for the East Indies on the following Monday or Tuesday, or at all ; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, arranged to have two thousand yards of woollen cloth tilleted or packed in extra coverings for immediate shipment to the East Indies or elsewhere, to the great damage and deception of the said George Willcock, against the form of the statute in such case made.

Eighteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said David Braun and Benjamin Kortoske, on the seventeenth day of August, in the year of our Lord One thousand eight hundred and sixty-one, unlawfully, knowingly, and designedly did falsely pretend to one George Willcock that the said David Braun and Benjamin Kortoske had contracted with a merchant, then carrying on business as an exporter of goods to the East Indies, to sell to him, and that he wanted to buy for that purpose large quantities of goods (to wit) two thousand yards of woollen cloth, and also did then and there falsely pretend to the said George Willcock that they the said David Braun and Benjamin Kortoske had sold two thousand yards of woollen cloth to a merchant, then carrying on business as an exporter of goods to the East Indies, and also did then and there falsely pretend to the said George Willcock that they the said David Braun and Benjamin Kortoske required two thousand yards of woollen cloth to be delivered to them in London within the four days next ensuing, for immediate shipment to the East Indies, and also did then and there falsely pretend to the said George Willcock as aforesaid that they the said David Braun and Benjamin Kortoske required two thousand yards of woollen cloth to be shipped on board a vessel, which was appointed to sail for the East Indies on the following Monday or Tuesday, and also did then and there falsely pretend to the said George Willcock as aforesaid that they the said David Braun and Benjamin Kortoske had arranged to have two thousand yards of woollen cloth tilleted or packed in extra coverings for immediate shipment to the East Indies, by means of which said false pretences the said David Braun and Benjamin Kortoske did then unlawfully obtain from the said George Willcock large quantities of goods (to wit), two thousand yards of woollen cloth, of the value of four hundred and three pounds, of the goods of the said George Willcock, with intent to defraud ; whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, contracted with a merchant, then carrying on business as an exporter of goods to the East Indies, to sell to him, and did not want to buy for that purpose, large quantities of goods (to wit), two thousand yards of woollen cloth ; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, sold two thousand yards of woollen cloth to a merchant, then carrying on business as an exporter of goods to the East Indies ; and whereas, in truth and in fact, the said David Braun and Benjamin

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Kortoske did not, nor did either of them, require two thousand yards of woollen cloth to be delivered to them in London, within four days, then next ensuing, for immediate shipment to the East Indies or elsewhere; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske did not, nor did either of them, require two thousand yards of woollen cloth to be shipped on board a vessel which was appointed to sail for the East Indies on the following Monday or Tuesday or at all; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, arranged to have two thousand yards of woollen cloth tilted or packed in extra coverings, for immediate shipment to the East Indies or elsewhere, to the great damage and deception of the said George Willcock, against the form of the statute in such case made.

Nineteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said David Braun and Benjamin Kortoske, on the eighth day of August, in the year of our Lord One thousand eight hundred and sixty-one, unlawfully, knowingly, and designedly did falsely pretend to one Ben Davis, then being the agent and salesman of one James Collinge, that the said David Braun and Benjamin Kortoske had contracted with an East India merchant who was then in London to purchase large quantities of goods for the East India market, and also did then and there falsely pretend to the said Ben Davis, so being such agent and salesman as aforesaid, that they, the said David Braun and Benjamin Kortoske had sold two hundred and fifty pieces of calico, and four hundred pieces of prints to an East India merchant who was then residing in the city of London, for shipment to the East Indies, by means of which said false pretences the said David Braun and Benjamin Kortoske did then, on the thirteenth day of August in the year of our Lord One thousand eight hundred and sixty-one, unlawfully obtain from the said James Collinge large quantities of goods (to wit), two hundred and fifty pieces of calico and four hundred pieces of prints, of the value of four hundred and forty-four pounds eight shillings and ten pence, of the goods of the said James Collinge, with intent to defraud; whereas in truth and in fact the said David Braun and Benjamin Kortoske had not, nor had either of them, received orders from an East India merchant who was then in London to purchase large quantities of goods for the East India market; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not nor had either of them, sold two hundred and fifty pieces of calico and four hundred pieces of prints, or any of it, to an East India merchant who was then residing in the city of London, for shipment to and disposal in the East Indies, to the great damage and deception of the said James Collinge, against the form of the statute in such case made.

Twentieth count.—And the jurors aforesaid, upon their oath aforesaid, further present that the said David Braun and Benjamin Kortoske on the eighth day of August, in the year of our Lord One thousand eight hundred and sixty-one, unlawfully, knowingly, and designedly did falsely pretend to the said James Collinge that the said David Braun and Benjamin Kortoske had contracted with an East India merchant who was then in London to purchase large quantities of goods for the East India market, and also did then and there falsely pretend to the said James Collinge that they, the said David Braun and Benjamin Kortoske had sold two hundred and fifty pieces of calico and four

hundred pieces of prints to an East India merchant, who was then residing in the city of London, for shipment to the East Indies, by means of which said false pretences the said David Braun and Benjamin Kortoske did then, on the thirteenth day of August, in the year of our Lord One thousand eight hundred and sixty-one, unlawfully obtain from the said James Collinge large quantities of goods (to wit), two hundred and fifty pieces of calico and four hundred pieces of prints, of the value of four hundred and forty-four pounds eight shillings and ten pence, of the goods of the said James Collinge, with intent to defraud; whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, received orders from an East India merchant who was then in London to purchase large quantities of goods for the East India market; and whereas, in truth and in fact, the said David Braun and Benjamin Kortoske had not, nor had either of them, sold two hundred and fifty pieces of calico and four hundred pieces of prints, or any of it, to an East India merchant who was then residing in the city of London, for shipment to, and disposal in, the East Indies, to the great damage and deception of the said James Collinge, against the form of the statute in such case made.

Twenty-first count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the said seventeenth day of August, in the year of our Lord One thousand eight hundred and sixty-one, the said David Braun and Benjamin Kortoske did unlawful, amongst themselves and with divers other persons, to the jurors unknown, conspire, combine, confederate, and agree together falsely and fraudulently to cheat and defraud the said John Hart and George Willcock, and each of them, of large quantities of goods of the goods of the said George Willcock, by means of certain false, fraudulent, and deceitful statements, representations, pretences, and appearances, and that, in pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement they, the said David Braun and Benjamin Kortoske, and the said other persons conspiring with them as aforesaid did, on the said seventeenth day of August, in the year of our Lord One thousand eight hundred and sixty-one, and on the said nineteenth day of August, in the year of our Lord One thousand eight hundred and sixty one, and on divers other days and times, represent and pretend to the said John Hart, George Willcock, and divers other persons that they, the said David Braun and Benjamin Kortoske had received orders to purchase large quantities of goods for and on account of a merchant then residing in the city of London, and carrying on business as an exporter of goods to the East Indies, also that they, the said David Braun and Benjamin Kortoske, had contracted to sell, and that they had sold, large quantities of goods to a merchant then residing in the city of London, and carrying on business as an exporter of goods to the East Indies, and that they wanted the said goods to deliver to him; also, that they, the said David Braun and Benjamin Kortoske wanted two thousand yards of woollen cloth to be shipped, within four days then next ensuing, on board a vessel which was then appointed to sail for the East Indies; also, that they, the said David Braun and Benjamin Kortoske, had arranged to have the said woollen cloth tilleted or packed in extra coverings, for immediate shipment to the East Indies; also, that the delivery of the said woollen cloth on any day later than the following Tuesday (to wit), the twentieth day of August, in the year of our Lord One thousand eight hundred and sixty-one, would be too late for

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shipment of the said woollen cloth to the East Indies ; also, that the said David Braun and Benjamin Kortoske, had sold the said woollen cloth to an East India merchant at a profit of nineteen pounds sterling, and also, that they, the said David Braun and Benjamin Kortoske, were then solvent, and able to pay all their creditors in full, all which several representations and pretences were false, fraudulent, and deceitful, they, the said David Braun and Benjamin Kortoske, and the said other persons conspiring with them as aforesaid, then well knew, to the great damage of the said John Hart and George Willcock, and each of them, and against the peace of our Lady the Queen, Her Crown and dignity.

Twenty-second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the said eighth day of August, in the year of our Lord One thousand eight hundred and sixty-one, the said David Braun and Benjamin Kortoske did, amongst themselves and with Bernard Kortoske and divers other persons to the jurors unknown, conspire, combine, confederate, and agree together, falsely and fraudulently to cheat and defraud the said Ben Davis and James Collinge, and each of them, of large quantities of goods of the said James Collinge by means of certain false, fraudulent, and deceitful statements, representations, pretences, and appearances, and that in pursuance of, and according to the said conspiracy, combination, confederacy, and agreement they, the said David Braun and Benjamin Kortoske, together with the said Bernard Kortoske, and the said other persons conspiring with them as aforesaid, did, on the said eighth day of August, in the year of our Lord One thousand eight hundred and sixty-one, and on the said thirteenth day of August, in the year of our Lord One thousand eight hundred and sixty-one, and on divers other days and times, represent and pretend to the said Ben Davis, James Collinge, and divers other persons, that the said David Braun and Benjamin Kortoske had received orders from an East India merchant, who was then in London, to purchase large quantities of goods for the East India market ; also that the said David Braun and Benjamin Kortoske had contracted to sell large quantities of goods (to wit), two hundred and fifty pieces of calico and four hundred pieces of prints, to an East India merchant, who was then residing in the city of London, and wanted goods to deliver to him ; also that the said goods were to be shipped immediately for the East Indies ; also, that the said goods must be packed in a particular mode to protect them from damage on the voyage to, and upon landing in, the East Indies ; and also that the said David Braun and Benjamin Kortoske were solvent and able to pay all their creditors in full, and which several representations and pretences were false, fraudulent, and deceitful, as they, the said David Braun, Benjamin Kortoske, Bernard Kortoske, and the said other persons conspiring with them as aforesaid, then well knew, to the great damage of the said Ben Davis and James Collinge, and each of them, and against the peace of our Lady the Queen, Her Crown and dignity.

Twenty-third count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the said eighth day of August, in the year of our Lord One thousand eight hundred and sixty-one, the said David Braun and Benjamin Kortoske, together with one Bernard Kortoske and divers other persons, unlawfully did conspire, combine, confederate, and agree together, by divers false pretences and subtle means and devices to obtain and acquire to themselves of and from the

said George Willcock, James Collinge, John Hart, and Ben Davis divers large quantities of goods of the goods of the said George Willcock and James Collinge, and to cheat and defraud them thereof, to the great damage of the said George Willcock, James Collinge, John Hart, and Benjamin Davis, and each of them, and against the peace of our Lady the Queen, Her Crown and dignity.

Twenty-fourth count.—And the jurors aforesaid, upon their oaths aforesaid, do further present that on the fifteenth day of January, in the year of our Lord One thousand eight hundred and sixty-one, and on divers other days and times, the said David Braun and Benjamin Kortoske, together with Bernard Kortoske, Raphael Kortoske, Meyer Kortoske, and divers other evil disposed persons, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together to obtain from Frederick Thomas Kirkby, William Johnson, Alfred James Martin, Abraham Talbot, Walter Mitchell, Henry Bolland, Joseph Mac-laren, William Henry Craven, Thomas Iredale, Charles John Lockwood, Albert De Vaux, Henry Sheard, James Webster, Joseph William Shaw, Richard Webb, Augustus Powell, Walter Anderson, William Quinn, James Marshall, Jean Montigny, George Willcock, James Collinge, and divers other persons, being tradesmen, warehousemen, merchants, and manufacturers of goods, divers large quantities of their goods and chattels, without paying, or intending to pay for the same, with intent to obtain to themselves money and other profit, and to cheat and defraud the said owners thereof. And the jurors aforesaid, upon their oath aforesaid, do further present that the said David Braun and Benjamin Kortoske, did, in pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement, falsely pretend that they had received orders from, and had sold goods to, solvent merchants carrying on business in Canada and in the East Indies, and were making consignments to the said merchants in the ordinary course of trade.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said David Braun and Benjamin Kortoske did, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, consign divers large quantities of the said goods and chattels so fraudulently obtained to the said Bernard Kortoske, Raphael Kortoske, and Meyer Kortoske, in Canada, they the said Bernard Kortoske, Raphael Kortoske, and Meyer Kortoske, being then and there insolvent, as the said David Braun and Benjamin Kortoske then well knew, and that they the said David Braun and Benjamin Kortoske sent the said goods to the said Bernard Kortoske, Raphael Kortoske, and Meyer Kortoske, in Canada, in order that they the said Bernard Kortoske, Raphael Kortoske, and Meyer Kortoske, might, in Canada, pledge, sell, and dispose of, otherwise than in the ordinary course of trade, the same goods, and that the said David Braun, Benjamin Kortoske, Bernard Kortoske, Raphael Kortoske, and Meyer Kortoske might share the proceeds thereof, without paying for the same, and that the said David Braun and Benjamin Kortoske did, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, deposit and pledge divers large quantities of the said goods and chattels so fraudulently obtained as security for certain advances of money made thereon with one Krozniski Wilhelms, and did make certain false entries in their books of account, by means of which it was made to appear that the said Krozniski Wilhelms had advanced seven hundred and forty-two pounds more than the true amount of such advances, and the jurors

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aforesaid, upon their oath aforesaid, do further present that the said David Braun and Benjamin Kortoske did, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement make divers false entries in their books, whereby several persons (to wit) Henry Calisher and Jones Brothers and others were made to appear as creditors of the said David Braun and Benjamin Kortoske, when, in truth and in fact, they were debtors to the said David Braun and Benjamin Kortoske; and whereby several other persons (to wit) Harris Tollerma and Henry Morris were made to appear to have paid their accounts, when, in truth and in fact, they were indebted to the said David Braun and Benjamin Kortoske in divers large sums of money. And the jurors aforesaid, upon their oath aforesaid, do further present that the said David Braun and Benjamin Kortoske did, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, on the nineteenth day of September, in the year of our Lord One thousand eight hundred and sixty-one, present a petition for private arrangement with their creditors in the Court of Bankruptcy in London, and did then and there wilfully, deceitfully, and designedly conceal the manner in which they had dealt with the goods so fraudulently obtained, against the peace of our Lady the Queen, Her Crown and dignity.

Twenty-fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the said first day of September, in the year of our Lord One thousand eight hundred and sixty-one, the said David Braun and Benjamin Kortoske, together with Bernard Kortoske, Raphael Kortoske, Meyer Kortoske, and divers other evil disposed persons unlawfully, fraudulently, and deceitfully did conspire, combine confederate, and agree together, by divers fraudulent devices, to cheat and defraud the said Frederick Thomas Kirkby, William Johnson Alfred James Martin, Abraham Talbot, Walter Mitchell, Henry Bolland Joseph Maclaren, William Henry Craven, Thomas Iredale, Charles John Lockwood, Albert De Vaux, Henry Sheard, James Webster Joseph William Shaw, Richard Webb, Augustus Powell, Walter Anderson, William Quinn, James Marshall, Jean Montigny, George Willcock, James Collinge, and each of them, of their moneys, goods, and chattels, to the great damage of the said Frederick Thomas Kirkby William Johnson, Alfred James Martin, Abraham Talbot, Walter Mitchell, Henry Bolland, Joseph Maclaren, William Henry Craven Thomas Iredale, Charles John Lockwood, Albert De Vaux, Henry Sheard, James Webster, Joseph William Shaw, Richard Webb Augustus Powell, Walter Anderson, William Quinn, James Marshall Jean Montigny, George Willcock, James Collinge, and against the peace of our Lady the Queen, Her Crown and dignity.

Twenty-sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the nineteenth day of September, in the year of our Lord One thousand eight hundred and sixty-one, the said David Braun and Benjamin Kortoske, together with Bernard Kortoske, Raphael Kortoske, Meyer Kortoske, and divers other evil disposed persons, unlawfully, fraudulently, and deceitfully did conspire combine, confederate, and agree together, by divers false and fraudulent means and devices, to cheat and defraud Samuel Lowry and others, the being the assignees of the estate and effects of the said David Braun and Benjamin Kortoske, of their moneys, goods, and chattels, to the great damage of the said Samuel Lowry and others, and against the peace of our Lady the Queen, Her Crown and dignity.

Twenty-seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the third day of September, in the year of our Lord One thousand eight hundred and sixty-one, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske owed divers debts and large sums of money to Samuel Lowry and others, who had before then respectively sold them goods on credit, and were then creditors respectively for the value thereof; and that the said David Braun and Benjamin Kortoske had before then committed an act of bankruptcy, and were in contemplation of bankruptcy, and were afterwards (to wit), on the thirteenth day of January, in the year of our Lord One thousand eight hundred and sixty-two, adjudged bankrupts; and that the said David Braun and Benjamin Kortoske then, and on divers other days, between that day and the day of taking this inquisition, by themselves and with divers other persons to the jurors aforesaid unknown, conspire, combine, confederate, and agree together to cheat and defraud the said creditors of the moneys so due to them, and of payment, and by subtle, false, and fraudulent means and devices to prevent them from obtaining any dividend or a fair share of their estate and effects, and did, in pursuance of the said conspiracy, falsely, unlawfully, and fraudulently alter and falsify their books of account, conceal some of their estate and effects, give false accounts upon their examinations of their estate and effects and of the way in which they had disposed thereof, pawn and pledge divers parts thereof, against the peace of our Lady the Queen, Her Crown and dignity.

Twenty-eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid, and within the jurisdiction of the Central Criminal Court, the said David Braun and Benjamin Kortoske, so having committed an act of bankruptcy, and being indebted as aforesaid, and so being in contemplation of bankruptcy, and so being adjudicated bankrupt, did then and on divers other days between that day and the day of taking this inquisition, amongst themselves, and with divers other persons to the jurors unknown, conspire, combine, confederate, and agree together to pervert and obstruct the course of justice in the said Court of Bankruptcy, and to defeat the objects of the law of bankruptcy; and that, in pursuance of the said conspiracy, the said David Braun and Benjamin Kortoske did unlawfully and fraudulently alter and falsify their books of account, conceal some of their estate and effects, give false accounts upon their examinations of their estate and effects, and of the way in which they had disposed thereof, and did not fully or truly discover the same, against the peace of our Lady the Queen, Her Crown and dignity.

At the close of the case for the prosecution,

Collier, Q.C., went through the evidence on the whole twenty-eight counts of the indictment, and contended there was no evidence to support any one of the offences charged.

MARTIN, B.—I think there is evidence of the defendants' conspiring together to cheat and defraud certain creditors, and the case must go to the jury. The prosecution must, however, elect upon which count they will proceed, for there is evidence of but one offence.

Ballantine, Serjt., elected to go to the jury on the twenty-fifth count.

Verdict, Guilty.

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V.
BRAUN
AND
KORTOSKE.

1862.

*Bankruptcy—
Indictment—
Election.*

CENTRAL CRIMINAL COURT.

November 27, 1862.

(Before Mr. JUSTICE BYLES.)

REG. v. WELTON. (a)

Illness of witness—Reading deposition—11 & 12 Vict. c. 42, s. 7.

In the absence of medical evidence, deposition not allowed to be read.

ELIZABETH WELTON was charged with feloniously casting and throwing Annie Welton into certain water, with intent to kill and murder her.

Ribton and Oppenheim for the prosecution.

Sleigh, for the prisoner.

In the course of proving the case for the prosecution it appeared that the prisoner had made certain statements to a policeman, King, and that, in his examination before the magistrates, King had repeated the statements in his evidence, which was returned on the depositions. It was now said that King was too ill to attend, and *Ribton* proposed reading his deposition, and called—

Thomas Harris, P. C., 7, who said:—I know police-constable Samuel King, and saw him this morning in his bed. He has fever. I have a certificate here. He has been confined to his bed about a fortnight, and the divisional surgeon, Mr. Tenby, is attending him; he is not able to get up yet.

BYLES, J.—Do you know of your own knowledge that he has been confined to his bed a fortnight?

Answer.—No; only from what somebody has told me. I saw him this morning, and yesterday morning; he was in bed. I had not seen him till yesterday since he has been ill.

Sleigh objected, that upon this evidence the deposition could not be read, and that the certificate was inadmissible.

BYLES, J.—The words of the statute relied upon for the prosecution, and by which they seek to make the deposition admissible in evidence are, “If upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness, that any person whose depo-

ation shall have been taken as aforesaid is dead, or so ill as not to be able to travel; and if it also be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witnesses, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution." I am of opinion, that to make this deposition admissible, there should be the evidence of a medical man upon oath, or other evidence upon oath, which the court might think of equal value to sworn medical testimony. The constable, Harris, says he has been told King is suffering from fever; how can he know the illness is of such a nature as to render the witness "so ill as not to be able to travel?" A medical man is the proper witness of that fact, and no medical man is called. The deposition cannot be read.

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—
1862.
—
*Illness of
witness—
Reading
deposition.*

REG. v. WELTON. (a)

Name in indictment not proved—Amendment—14 & 15 Vict. c. 100, s. 1.

The indictment charged the prisoner with the intent to kill and murder Annie Welton. The prosecution failed to prove the child had ever borne such a name.

Held, that the indictment might be amended under the 14 & 15 Vict. c. 100, s. 1.

ELIZABETH WELTON was charged with feloniously casting and throwing Annie Welton into certain water, with intent to kill and murder her.

Ribton and Oppenheim for the prosecution.

Sleigh for the prisoner.

The chief witness for the prosecution said she had never seen the child before the prisoner attempted to kill it, and had never heard any one call it by any name. The prisoner was a stranger to the neighbourhood. Upon this

Sleigh objected that there was no case to go to the jury, there being no proof of the name of the child alleged to have been assaulted. The indictment stated it was one Annie Welton. The facts were that the name of the child was unknown.

Ribton.—Then, under Lord Campbell's Act, I propose to amend the indictment by striking out the words Annie Welton and insert, "a certain female child whose name is to the jurors unknown."

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Sleigh.—The 14 & 15 Vict. c. 100, s. 1, only empowers an amendment as to the Christian name or surname of the person alleged to have been injured. The grand jurors have presented the name and the proposed alteration would not be amending what was simply a variance proved. The form of the indictment would be changed.

BYLES, J.—The act which gives power of amendment states in the preamble that “offenders frequently escape conviction on the trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case.” Here the amendment cannot prejudice the prisoner in her defence, and consider the variance not “material to the merits of the case.” — statute of this kind should have a wide construction, and I shall not interpret it in favour of technical strictness. Let the indictment be amended as proposed.

The amendment having been made the jury said

Not Guilty.

NORTHERN CIRCUIT.

Liverpool, March 21, 1863.

(Before Mr. Baron MARTIN.)

REG. v. MARKS LYONS. (a)

Bankruptcy—Evidence—Obtaining goods on credit.

Section 233 of the "Bankruptcy Act, 1849," applies to civil matters only, and in criminal prosecutions against a bankrupt formal proof of the trading and other requisites must be given. Where a person obtained goods on approval and pawned them, and afterwards obtained credit for them:

Held, that the "Bankruptcy Act, 1861," s. 221, did not apply.

THE prisoner was indicted under the provisions of the Bankruptcy Act, 1861, sect. 221, the 11th clause of which provides that, "If, being a trader, he shall, with intent to defraud his creditors, within three months next before the filing of the petition for adjudication, pawn, pledge, or dispose of, otherwise than by *bonâ fide* transactions, in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for."

The first count was for illegally pledging certain watches, which he had obtained on credit within three months before his bankruptcy from L. Cohen and another, and which still remained unpaid for with intent to defraud his creditors.

The second count was in the same form, except that it charged the defendant with "pawning" the same goods.

The third count charged the defendant with "disposing" of the same goods with the like intent.

The prisoner had, it appeared, written to Messrs. Cohen and requested them to send some watches on approval. They sent him 300*l.* worth, and the defendant wrote acknowledging the receipt of the goods, and saying that he would keep the whole of the goods and pay for them by bills. This Messrs. Cohen peremptorily refused, and the defendant thereupon sent back 100*l.* worth, retaining the remainder, and offering bills for them. This offer was refused by Messrs. Cohen, and they sent a member

(a) Reported by R. D. M. LITTLE, Esq., Barrister-at-Law.

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of their firm from Birmingham to Liverpool to inquire after the defendant. The day before this gentleman arrived in Liverpool the defendant pledged the whole of the watches with a pawnbroker for 120*l*. On seeing Mr. Cohen the defendant agreed to pay for the watches 70*l*. in cash, 100*l*. in bills, and the remainder in cash as soon as he could.

Deighton and *R. G. Williams* for the prosecution.

Littler, for the prisoner.

Deighton called an officer from the Bankruptcy Court, and put in a file of the proceedings and a copy of the *Gazette* containing the advertisement of the prisoner's bankruptcy, under the 12 & Vict. c. 106, s. 233. (a)

Littler objected that this section did not apply to criminal cases and that the prosecution must prove the trading, the petitioner's creditor's debt, the act of bankruptcy, the petition, and the adjudication.

MARTIN, B.—That is clearly so. That section was never intended to apply to criminal cases.

Formal proof was then given as to all the requisite points.

Mr. Cohen, when called as a witness, swore distinctly that the goods were on *approval* only until the 17th of October, and that the before mentioned agreement was made on that day.

The pawnbroker's assistant, who was called to prove the pledging by the prisoner, proved that the property was pledged on the *sixteenth* of October.

MARTIN, B.—Then there is an end of the case. The bankruptcy has been a day too quick for you. The goods had not at that time been obtained on credit. (b)

(a) That if the bankrupt shall not (if he were within the United Kingdom at the date of adjudication), within twenty-one days after the advertisement of the bankruptcy in *London Gazette*, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of adjudication) within twelve months after such advertisement, have commenced an action, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and all actions at law or suits in equity brought by the assignees for any debt or demand which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and forth of such fiat, or before the date and filing of the petition for adjudication, and that fiat was sued forth, or such petition filed, on the day on which the same is stated in *Gazette* to bear date.

(b) It seems that the offence (if any) committed by the bankrupt was under the tenth clause and was an obtaining on credit "under the false colour and pretence of carrying on business and dealing in the ordinary course of trade with intent to defraud."—[REPORTER.]

WESTERN CIRCUIT.

SOMERSET SPRING ASSIZES.

Taunton, March 1863.

REG. v. COX.

Perjury—False declaration—5 & 6 Will. 4, c. 62, s. 18.

An indictment for perjury in making a false declaration under 5 & 6 Will. 4, c. 62, s. 18, cannot be sustained when the deed or written instrument of which the declaration is confirmatory is not duly proved.

THE prisoner was indicted for perjury in making a false declaration under 5 & 6 Will. 4, c. 62, s. 18, to the effect that he had done no act to incumber certain lands, his property, and that he was in possession of the said lands, and in receipt of the rents and profits thereof. The declaration was duly sworn and made in support of an application to a building society, in 1861, for an advance of 150*l*. The mortgage deed of 1861 to the building society was produced, but the attesting witness was not called to prove it. The original conveyance of the property to the prisoner was put in.

Folkard for the prisoner, contended that inasmuch as the deed, of which the declaration was confirmatory, was not proved (and it was therefore not shown that the matter sworn to in the declaration was material) the indictment could not be sustained.

H. T. Cole for the prosecution, contended that the declaration was made to confirm the original conveyance, and not the mortgage which was executed after the declaration, and therefore that the indictment could be sustained under the statute.

BYLES, J.—I am of opinion that the objection by the learned counsel for the prisoner is fatal to the indictment. The preamble of the statute, 5 & 6 Will. 4, c. 62, "whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments, or allegations, or proof of debts, or of the execution of deeds or other matters," must be read with the enacting part; and as the deed which rendered the declaration necessary is not proved this indictment cannot be sustained.

Not Guilty.

COURT OF CRIMINAL APPEAL.

April 25, 1863.(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
MARTIN, B. and KEATING, J.)

REG. v. WILLIAM BURGESS. (a)

*Larceny—Ownership—Co-operative society—Felonious taking by—
member.*

Upon the trial of an indictment for stealing the money of B., it was proved that B. received the money as the servant of a co-operative society of which the prisoner was a member, for the sale to members of goods provided by the common funds, and that B. was accountable to the treasurer for the money so received. The money was marked and put into a till under B.'s charge, from which the prisoner clandestinely took it:

Held, that B. was sufficiently possessed of the money to sustain a conviction for larceny of the money, although the prisoner was a member of the society.

CASE reserved for the opinion of this Court by Mellor, J.

The prisoner was convicted before me at the last Assizes at Chester, of stealing 5s., alleged in the first count to be the money of David Bancroft, and in the second count to be the money of the Stockport Industrial and Equitable Co-operative Society.

There was evidence that the Stockport Industrial and Equitable Co-operative Society was duly enrolled, but there was no evidence that trustees had been appointed pursuant to the 18 & 19 Vict. c. 63, s. 17.

The proceeds of the society consisted of the payments of the members in respect of shares held by them therein; and the affairs were managed by a committee of shareholders, of which the prisoner was a member; and under their superintendence the actual duties of management were performed by a general manager and treasurer.

The society occupied several sites of premises as stores for goods, which were provided from the funds contributed by the members, and the goods were sold to the members of the society.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The New Burke Lane Store was under the care of David Bancroft, a boy aged thirteen, and it was his duty to sell the goods at the store; and each day before shutting up the treasurer called at the store, stated an account with Bancroft of all money received by the latter, giving to Bancroft a duplicate of such account for his protection, and keeping the accounts in a book belonging to the society.

On Christmas-eve the account had been settled as usual; but as the store was kept open after such settlement, 1*l.* 14*s.* 6*d.* was received by Bancroft, and not paid over, but remained in the till.

The prisoner had occasionally called at the store to assist Bancroft, as he said; and in consequence of suspicions entertained by other members of the committee, one of them on Christmas-day proceeded with Bancroft to the store, and having taken the money and marked a portion of it, they then restored the money so marked to the till.

On the opening of the store on the 26th Dec. the prisoner called there, and whilst, as he supposed, the attention of the boy Bancroft was occupied in the business, the prisoner was seen by a person secreted for the purpose of observing, to take two half-crowns of the marked money from the till, and put them into his pocket and go away.

Mr. Giffard, counsel for the prisoner, objected that, as the prisoner was a member of the society, and a shareholder in the funds, he could not be convicted on either count; that the possession of Bancroft was the possession of the society, and that the possession of the society was the prisoner's possession in common with the other members.

I overruled the objection, and the case went to the jury on the facts, and the prisoner was convicted; but I postponed the judgment and discharged the prisoner on his own recognizance to appear and receive sentence when called upon.

I request the opinion of the Court of Criminal Appeal whether the prisoner was rightly convicted.

JOHN MELLOR.

No counsel appeared on either side.

POLLOCK, C.B.—We are all of opinion that David Bancroft, who was employed at a store kept by the Co-operative Society, to sell the goods there, and who had charge of a till there from which 5*s.* was stolen by the prisoner, and who was accountable for the money, was sufficiently possessed of the money stolen to sustain the conviction of the prisoner—the indictment alleging the money to be the money of David Bancroft—although the prisoner was one of the subscribers to the Co-operative Society.

The rest of the Court concurring,

Conviction affirmed.

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—
*Larceny—
Ownership.*

COURT OF CRIMINAL APPEAL.

May 30, 1863.

(Before COCKBURN, C.J., POLLOCK, C.B., WILLIAMS, and
CROMPTON, JJ., and BRAMWELL, B.)

REG. v. LEWIS LEE. (a)

False pretences—Existing fact.

The prosecutor lent 10l. to the prisoner on the false pretence that he was going to pay his rent, and if the prisoner had not told him that he was going to pay his rent, the prosecutor would not have lent the money. Held that this was not a false pretence of any existing fact to warrant conviction.

CASE reserved for the opinion of this Court by the Chairman of the Devonshire Quarter Sessions.

Devon, } At the General Sessions of the Peace of our Lady the
to wit. } Queen, held at the Castle of Exeter, in and for the
county of Devon, on Tuesday, the 12th day of May, in the
twenty-sixth year of the reign of our Sovereign Lady Victoria,
by the grace of God Queen of the United Kingdom of Great
Britain and Ireland, Defender of the Faith, and in the year of
our Lord 1863, before Baldwin Fulford, John Northmore,
Esquires, and others their companions, Justices of our said Lady
the Queen, assigned to keep the peace of our said Lady the
Queen in and for the county aforesaid, and also to hear and
determine divers felonies, trespasses and other misdemeanors in the
said county committed,

Lewis Lee was indicted and tried for obtaining money by false pretences.

The following is an extract of so much of the indictment as sets out the charge:—

That, "contriving and intending to cheat and defraud, he did unlawfully, knowingly, and designedly falsely pretend to our James Oliver Hill that he the said Lewis Lee had to pay his rent to the Squire, meaning thereby Richard Sommers Gard, on the 1st of March then next, but, as that day was Sunday, he had

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

to pay the said rent on the Monday then following, and that he, the said Lewis Lee, wanted 10*l.* to make up his said rent; by means of which said false pretence the said Lewis Lee did then and there, to wit, on the 27th day of February, in the year aforesaid, at Monkton aforesaid, unlawfully obtain from the said James Oliver Hill 10*l.*, the money of the said James Oliver Hill, with intent then and there to cheat and defraud. Whereas, in truth and in fact, the said Lewis Lee had not to pay his said rent on the 1st of March then next, or on the Monday then following. And whereas, in truth and fact, the said Richard Sommers Gard had not fixed with the said Lewis Lee to pay his said rent on the said 1st day of March, or the following day. And whereas, in truth and in fact, the said Lewis Lee did not want the said 10*l.* to make up his said rent. And whereas, in truth and in fact, the said Lewis Lee did not, on the said 1st day of March then next, or on the Monday then following, or at any other time afterwards, pay his said rent, or the said sum of 10*l.* for his said rent. And the said Lewis Lee, at the time he so falsely pretended as aforesaid, well knew the said pretence to be false.

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1863.
1863.
False pretence
— Existing
fact.

The following facts were proved in evidence:—

That prisoner was a tenant to the said Richard Sommers Gard, and owed him 180*l.* for rent, and that he had promised Mr. Gard's bailiff to pay it in February; that he did pay part of it in February, and promised to pay the remainder the first week in March. That James Oliver Hill, the prosecutor, was also tenant to Mr. Gard, and lived on the adjoining farm; and, on Wednesday, the 25th of February, he was on the prisoner's farm, and saw there stock worth 200*l.* or more. That the prisoner had been, for some weeks, in treaty with prosecutor's father-in-law to let him a field to grow flax, for which prisoner asked him 5*l.* an acre. Prosecutor's father-in-law had offered him 4*l.* 10*s.*, and they were to meet on Monday or Tuesday, the 2nd or 3rd of March, to make final settlement. It had been agreed that the rent of a field should be paid thus: 10*l.* on taking possession, 10*l.* in May, 1863, and the remainder when the flax was cleared.

The prosecutor owed prisoner 16*l.* 10*s.* for a heifer and some hay, and on Friday, the 27th of February, prisoner called on him in the evening to settle the debt. Prosecutor put down two 10*l.* notes, but the prisoner said he could not give change, upon which it was arranged that the prisoner should take one of the 10*l.* notes and that the balance should be paid at the Honiton market the next day, which was done. Prisoner then said: "I am going to pay," or "I have got to pay my rent to the Squire on the 1st of March, but as that is Sunday I am going to pay it the next day. Will you advance 10*l.* for your father-in-law on the rent of the flax field?" Prosecutor replied, "I do not wish to be mixed up with my father-in-law's affairs, but you will see him on Monday or Tuesday, when you can make a settlement of everything." Prisoner then said, "Will you lend me 10*l.* till Tuesday or Wednesday, and I will give you a note of hand for it, to make it all

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False pretences
—*Existing*
fact.

business-like." Prosecutor then lent him 10*l.*, and he gave the prosecutor a formal promissory note for that amount. Prisoner did not say he required the sum of 10*l.* to make up his rent; but the prosecutor stated that he believed that was what he wanted for. The prosecutor in his evidence stated that, if he had told him he was going to pay his rent, he should not have let him have the money.

It was also proved that for about ten days previous to the 2 day of February prisoner had made arrangements to emigrate to New Zealand, and had taken a passage for himself and his family and had obtained a grant of land there. That on Saturday evening the 28th day of February he and his family privately left Monkton for London to go to New Zealand, having previously cleared off all his effects, cattle, corn, implements, and the best of his household furniture. He did not go to pay his rent, which was still unpaid; but at the time he obtained the 10*l.* from Hill he knew that he was, as appeared from his letters (which were in evidence), about to leave the next day for New Zealand, and did so leave. He was, however, apprehended at Deal, where he was waiting for the ship on board of which his family had embarked at Gravesend, he having left Gravesend for fear of the police, as appeared by his letters.

The Jury found the prisoner guilty, and stated their opinion that the prisoner's statement that he was going to pay his rent the Monday was a false pretence, and that the money was advanced on the credit of that false pretence.

The prisoner was thereupon sentenced to twelve calendar months' imprisonment with hard labour; the hard labour not to commence until the decision of the Criminal Court of Appeal in this case, and he remains in custody under this sentence, as well as under civil process for debt.

The Court agreed to submit the following questions for the opinion of the Court of Criminal Appeal:—

1. Whether the indictment, upon the face of it, shows a false pretence? and,
2. Whether the statement of the prisoner, as shown in evidence, is a false pretence within the meaning of the 88th section of 24 & 25 Vict. c. 96?

BALDWIN FULFORD, Chairman

No counsel appeared on either side.

COCKBURN, C.J.—The facts stated to have been proved in this case do not warrant the conviction. The money was advanced on the credit of the false pretence that the prisoner was going to pay his rent; but that is not a false pretence of any existing fact, although it is found that the prisoner had not the intention of paying his rent. The conviction must therefore be quashed.

The rest of the Court concurring,

Conviction quashed

COURT OF CRIMINAL APPEAL.

May 30, 1863.

(Before COCKBURN, C.J., POLLOCK, C.B., WILLIAMS and CROMPTON, JJ., and BRANWELL, B.)

REG. v. JARRALD AND OST. (a)

*Larceny Act—24 & 25 Vict. c. 96, s. 58—Being armed at night with intent to break and enter—Indictment—Proof.**Under the 24 & 25 Vict. c. 95, s. 58, which enacts that "Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any dwelling-house or other building," it is necessary to state in the indictment and prove in evidence the ownership of the building in order that the jury may know the charge they have to try, and the prisoner the charge he has to meet.*

THE following case was reserved for the opinion of this Court by the Chairman of the Suffolk Quarter Sessions, held at Bury St. Edmunds:—

At an Adjourned Sessions, held for the county of Suffolk at Bury St. Edmunds, on the 16th of March, 1863, William Jarrald and Thomas Ost were tried upon the following indictment:—

Suffolk, } The Jurors of our Lady the Queen, upon their oath to wit. } present, that William Jarrald and Thomas Ost, on the 21st of February, 1863, were found by night, to wit, at the hour of half-past three in the morning of the same day, armed with a certain dangerous and offensive weapon and instrument, to wit, a loaded gun, with intent then to break and enter a building, to wit, a malting, and to commit a felony therein, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

It having been proved that the prisoners were found in a field adjoining to three separate and distinct maltings, and that they were going in a direction which would lead them to any one of the three, the maltings being the property and in the occupation of three different owners, viz., Coe, Ardley, and Branwhaite, the counsel for the prisoners, at the conclusion of the case for the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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—

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Being armed by
night.

prosecution, objected that the indictment ought to have stated the ownership of the building mentioned, and the place where it was situate. No amendment was made: and the prisoners were both found guilty, and each was sentenced to three years' penal servitude.

The question submitted for the consideration of the Court of Criminal Appeal is, whether under the circumstances above stated the prisoners were rightly convicted.

PETER HUDDLESTON, Chairman of the said
Court of Quarter Sessions.

Bulwer, for the prisoners.—It is submitted that this conviction cannot be sustained. The indictment is bad because the ownership and situation of the malting are not stated therein. The indictment is founded on the 24 & 25 Vict. c. 96, s. 58, which enacts that "whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised, with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof, &c." Although the venue in the margin renders it unnecessary to state the county in the body of the indictment, still it would not be sufficient to allege that the prisoners were found by night in the county merely, or that the malting was situate in the county merely. The section is placed in the series headed "as to sacrilege, burglary, and housebreaking," in all which offences it is necessary to allege in the indictment the ownership and situation of the property. The evidence shows that there were three maltings belonging to three different persons, and the indictment should have stated the name of the owner and the situation of the one the prisoners intended to break and enter. [POLLOCK, C. B.—Supposing the prisoners had been overheard to say that they intended to break into whichever of the three they found most convenient, would they be punishable because it could not be specified that they intended to break into any particular one?] The indictment might have contained as many counts as there were different buildings and owners. [COCKBURN, C. J.—But then it might be said that the jury would have the same difficulty in specifying the particular one into which the prisoners intended to break and enter.] The criminal law does not punish a man for having a general criminal intention; a particular intent must be alleged and proved. Unless it can be said that a man is going to break into some one house in particular he cannot be convicted under this Act of Parliament. Stating the charge so generally in the indictment gives the prisoners no information as to the offence of which they

are accused, and which the prosecutor is going to prove against them. The prosecutor, upon this indictment, might go before the grand jury and give evidence as to the premises of A. B., and thereupon procure a true bill to be returned, while at the trial the indictment would be satisfied by giving evidence of an intention to break into premises of a different person in a different part of the county. Again, consistently with what is alleged in the indictment, the intent might be to break into the prisoner's own malting. If the charge had been with intent to break and enter a dwelling-house, it would have been clearly insufficient to allege the charge so generally in the indictment. The precedent in *Archbold's Crim. Plead.* states the ownership and situation of the premises. In 1 Russ. on Crimes, 824, it is said: "It is necessary to ascertain with exactness the felony really intended, as it must be laid in the indictment and proved agreeably to the fact. And a felony intended to be committed will not support an indictment charging a felony actually committed." In *Rex v. Ridley* (Russ. & Ry. 515), where the first count of the indictment alleged that the defendant, at the parish of W., in the county of N., having entered into a certain close there situate, with intent there illegally to kill game, was there found at night armed with a certain gun; and the second count charged him, in like manner, with having entered into a certain inclosed ground, but neither the close nor the inclosed ground were described by name, ownership, occupation, or abutments, the majority of the Judges thought the description insufficient, because it was substantially a local offence, and the defendant was entitled to know to what specific place the evidence was to be directed, and judgment was arrested. The same rule is laid down in *Starkie on Criminal Pleading*, that it is necessary to specify the ownership and situation of the premises in order to identify the offence charged.

Orridge, for the prosecution.—This is not a local offence, and it is not necessary to allege the ownership and situation of the premises in the indictment. [COCKBURN, C. J.—Must you not identify the charge so as to enable the prisoner to know what he has to meet?] The recent cases on the game laws are analogous, where it was held that it was not necessary to show that the prisoner had come from some land, and that the presumption of that fact might be drawn from the surrounding circumstances: (*Evans v. Botterill*, 8 L. T. Rep., N.S., 272; *Brown v. Turner*, 7 L. T. Rep., N.S., 683.) [COCKBURN, C. J.—The Poaching Act, 25 & 26 Vict. c. 114, was passed to meet a particular case, where there is good reason to suspect that men have been out poaching, and it is impossible to trace them to any particular place.] The 14 & 15 Vict. c. 100, s. 24, was then referred to.

COCKBURN, C. J.—I am of opinion that this conviction cannot be sustained. The first question is, What is the offence created by the Legislature? According to Mr. Orridge's contention, any man found by night with a dangerous or offensive weapon, or some instrument from which it is impossible to doubt that he is

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going to break into some house or building, is guilty of misdeemeanor. I do not think that is so, and I am of opinion that there must be a definite intention to break into some particular house. As to whether there must be an intention to commit a particular felony upon that point I say nothing. It is not enough to say that a man intended to break into a house generally. The rule of criminal pleading must not be lost sight of, and it must not be forgotten that there is no opportunity of getting a new trial in criminal cases on the ground of surprise, or that, if the defendant had had a better knowledge of what the nature of the offence charged was, he might have been able to meet it. The jury as the prisoner ought to know the precise offence charged against the prisoner, and as this does not appear on the indictment I think the conviction cannot be sustained.

POLLOCK, C. B.—I am of the same opinion. I will merely add, that Cockburn, C. J., has placed the doubt I felt in such a point of light that I feel his construction of the Act must be followed. If a man is found at night with a pair of pistols and burglary instruments upon him, under circumstances that there can be no doubt that he is out for a criminal purpose, the statute never intended that such a case as that should be the subject of perjury or servitude. Unless the statute goes that length this indictment is bad.

WILLIAMS, J.—I am of the same opinion. If sect. 58 intended that it should be a crime if a person was found at night armed with an offensive weapon or instrument with intent to break and enter into any dwelling-house, and commit a felony therein, although it could not be ascertained what dwelling-house, and although it could not be ascertained what felony he intended to commit, then this indictment is good. But I think the statute did not mean that, and that it is necessary to specify the ownership and situation of the premises the defendant intended to break into.

CROMPTON, J.—I am of the same opinion. I think that this indictment is good only in case it shows an intention to break and enter some definite dwelling-house or building, and to commit some definite felony therein. Under a particular statute it was not necessary to specify the mode in which a murder was alleged to have been committed. But you must specify a definite crime. In this case I think no crime was proved, for it was open to the jury to infer that the prisoners intended to break and enter in any one of the three malting houses; that is just the same principle as any one of 300. The words, to commit "any" felony therein, are the same as to break and enter into "any" dwelling-house, as to which all the precedents show that it is necessary to allege the ownership and situation of the premises.

BRAMWELL, B.—I concur.

Conviction quashed.

COURT OF QUEEN'S BENCH.

April 25, 1863.(Before COCKBURN, C.J., CROMPTON, BLACKBURN, and
MELLOR, JJ.)

KERKIN AND OTHERS v. JENKINS.

*Unlawful purpose—Felonious intention—Vagrant Act—5 Geo. 4,
c. 83, s. 4.*

An information under the 5 Geo. 4, c. 83, s. 4 (the Vagrant Act), charged the appellants with being found in the respondent's house at night "for an unlawful purpose, to wit, for the purpose of feloniously stealing the respondent's property." The evidence showed that they were in the respondent's house, partaking with his servants of his provisions without his knowledge or consent. The justices found that the appellants were in the house for the unlawful purpose of joining in the taking and consuming the respondent's property without his consent or knowledge, and convicted them:

Held, that, as the information laid a felonious purpose, it was essential to support it, that a felonious intention should be shown; that as the justices had merely found that the appellants were in the house for the purpose of unlawfully taking and consuming the respondent's property, without stating that they were there to commit a felony, the conviction was bad.

THIS was a case stated under 20 & 21 Vict. c. 43, for the opinion of the Court.

At a petty sessions, holden for the St. Austell division of East Powder, Cornwall, on the 3rd of June last, an information preferred by David Jenkins (the respondent) against Samuel Kerkin, James Huxtable, and George Colenso (the appellants), under 5 Geo. 4, c. 83, s. 4, commonly called the Vagrant Act, charging that they on the 7th of May, at Church Town, in the parish of Gorran, in the said county, at eleven o'clock at night, were found in the dwelling-house of the respondent for a certain unlawful purpose, to wit, for the purpose of feloniously stealing and converting to their own use certain provisions the property of the respondent, contrary to the form of the statute, was heard, and the said appellants duly convicted.

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*5 Allen, 4, C. 83,
C. 4.*

It was proved that on the day in question the household of respondent (who is vicar of the parish) consisted of himself, daughter, and three female servants. At ten p.m. the father retired to their respective rooms; but the respondent and daughter, suspecting that all was not right, went down to keep watch. The appellants and the respondent's servant and his schoolmistress were in the servants' bedroom, the door of which was fastened. The respondent demanded admission, which was refused. Two of the appellants then escaped by a window, and the third was afterwards turned out of the house. On entering the room the respondent found on the table the contents of an entertainment consisting of provisions, a portion of which was proved to be his property; and it was also proved that the appellants were in the respondent's house without his knowledge or consent. It was also proved that one of the appellants had been paying his addresses to one of the servants of the respondent, but it was not shown that he had ever been there at night.

We convicted the appellants on the ground that they were under the circumstances proved to us, in the house of the respondent for an unlawful purpose within the meaning of the Act.

The question of law arising on the above statement for the opinion of the Court is, was the purpose for which we found the appellants to have been in the respondent's house, namely, the purpose of joining in the taking and consuming of the provisions which were respondent's property, without his knowledge or consent, an unlawful purpose within the meaning of the Act?

Karslake, Q.C. for the respondent.—The appellants were proved to have been in the respondent's house for a felonious purpose. *CROMPTON, J.*—The purpose is very material here. Did they go to the house for another purpose than that laid in the indictment? They went for the purpose of consuming the respondent's property. The case may be assimilated to that of *Reg. v. (9 C. & P. 344)*, where it was held, that if a servant take his master's property and hand it over as a gift, it amounts to a felony. Had the parties been indicted, the judge must have left it to the jury to say whether the facts constituted a felony, and the Court will not disturb the finding of the magistrates before whom the facts were.

Field for the appellants.—The conduct of the parties amounted to gross impropriety, but did not constitute a felony. But assuming that on an indictment a felony might have been found, the Court has not been found in this case. The information charged the parties with felony, but the justices have merely found that they were there for an unlawful purpose. The conviction, therefore, cannot be sustained.

COCKBURN, C.J.—I think that the justices have stopped short of finding the charge on which the information is based. The information alleges that the appellants were in the house of the respondent "for an unlawful purpose, to wit, for the purpose of feloniously stealing." But the justices have hesitated to hold

the purpose was felonious, and have merely said that they were there for the unlawful purpose of consuming the respondent's provisions. Now this may be, and is, an unlawful purpose; but it is not such an unlawful purpose as is laid in the information. Had the matter formed the subject of an indictment a judge probably would not have withdrawn the evidence from the consideration of the jury, although he might have been tolerably certain that the result would be an acquittal. But we are not sitting here to decide a fact, but to interpret the law, and as the magistrates have shrunk from actually finding that the offence is a felony, and have asked us to define whether the act does amount to a felony, we must hold that their finding does not sustain the information, and that the conviction must therefore be quashed.

CROMPTON, J.—I do not consider that, to insure a conviction under the Act, it is always essential that a felony should be proved; but, as the respondent has chosen to lay the unlawful purpose as a felonious one, he is confined to it, and it is our duty to see whether the charge has been found. Now there was some evidence which might have been left to a jury of a felonious intention, and the magistrates might probably have come to a conclusion that a felonious act was contemplated. But they have shrunk from doing so, and merely found that the appellants were in the house for the unlawful purpose of consuming the respondent's property. This is not the offence laid in the information, and I therefore think that the parties were not properly convicted of the matters with which they were charged.

BLACKBURN, J.—The conviction can only be supported by finding that the parties were in the house for the purpose of committing felony, for the information is so laid. Has the offence, then, been so found, and is the evidence sufficient to sustain the finding? Now the magistrates have simply found that the appellants were in the respondent's house for the unlawful purpose of joining in the taking and consuming the respondent's property without his knowledge or consent. This is insufficient, as I think that they should have shown that they were there with a felonious intent. It is difficult to define precisely what would amount to a felony, and the evidence might probably have warranted the justices in finding a felonious act, but as they have not done so, I think that the conviction must be quashed.

MELLOR, J., concurred.

Conviction quashed.

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5 Geo. 4, c. 83,
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COURT OF QUEEN'S BENCH.

May 30, 1863.

(Before BLACKBURN and MELLOR, JJ.) (a)

TAYLOR (Appellant) v. NEWMAN (Respondent).

Unlawful killing—Pigeons—24 & 25 Vict. c. 96, s. 23.

By sect. 23 of the 24 & 25 Vict. c. 96 (Larceny Act), it is enacted that whosoever shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction, &c. :

Held, that this provision does not apply to a case where a party, under a claim of right, kills a pigeon which is doing mischief upon his land. A., the occupier of land, gave notice to B., who kept pigeons, that such pigeons did damage to his land, and that he would destroy them if they were not restrained. After this notice, finding the pigeons on his land, he fired his gun, whereupon they rose; he then fired again and killed one of them, and being convicted upon an information laid under the above section,

Held, that such conviction was bad.

THIS was a case stated by justices at petty sessions upon a conviction under sect. 23 of the 24 & 25 Vict. c. 96 (the Larceny Consolidation Act), for unlawfully killing a pigeon.

By the above section it is enacted: "Whosoever shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay over and above the value of the bird, any sum not exceeding 2*l*."

The facts of the case were these. A number of house pigeons belonging to a Mr. Lloyd, were kept for him at or near the house of one Thomas Newman, his gamekeeper, the respondent.

The appellant is a farmer, whose land is very near the house of

* (a) Cockburn, C.J., was unavoidably absent, and Wightman, J. was sitting in the Divorce Court.

the respondent, and the pigeons in question were in the habit in the day time of flying over and upon and feeding on appellant's lands. Appellant complained to the respondent of the injury he supposed to be done him by the pigeons, and on the 1st of January, 1863, he caused the notice hereinafter set forth to be served on Mr. Lloyd. On the 5th of February last appellant, with a loaded gun in his hand, went into one of his fields, where the said pigeons were feeding on the ground. Appellant fired at the pigeons, and thereby caused them to rise. Appellant then fired at them a second time, and killed one of the pigeons, which he left dead on the ground. The value of the pigeon killed was said to be 2s. 6d.

The following is a copy of the notice served on Mr. Lloyd above mentioned:—

"Hastings, 1st January, 1863.

"SIR,—Mr. Stephen Taylor, of Merriments Farm, Solehurst, has complained to us of the serious injury and annoyance he has sustained, and still continues to suffer, by reason of your pigeons being allowed to feed on his land, and he states he has in vain complained to you through your keeper about the matter, and he has now instructed us to inform you that he shall hold you responsible for all damages he may sustain in consequence; and we have to request that you will immediately cause them either to be destroyed, or prevent them doing further injury to Mr. Taylor's crops; if not, although Mr. Taylor will very much regret to do any act which may be considered at all unneighbourly, he will be compelled in self defence to shoot or otherwise destroy such pigeons, besides claiming damages against you as above stated; and you will be pleased to take this as notice of such his intention. We are, &c.,

"J. G. LANGHAM and SON."

On these facts it was contended by the appellant's attorney that the killing of the pigeon under the circumstances above stated was not an "unlawful killing," and therefore did not render appellant liable to the penalty imposed by the 23rd section of 24 & 25 Vict. c. 96, because after giving the above-mentioned notice, and the pigeons being still permitted to come upon his land, the appellant was justified by law in killing the said pigeons.

Francis, in support of the conviction, argued that, reclaimed pigeons being private property, the appellant was guilty of an unlawful act in killing the pigeon in question, within the meaning of the section. The present law is a re-enactment of section 33 of the 7 & 8 Geo. 4, c. 29, and was meant to apply to cases of an unlawful killing where the act does not amount to a larceny at common law. That, even if he had a right to kill the pigeon whilst actually on the ground eating his corn, he had no right to do so when it was flying away. [BLACKBURN, J.—I cannot believe that the statute was ever intended to

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apply to a case where the pigeon was feeding upon a man's land but only to cases where he does the act wantonly or without any colour of right. It seems strange to treat this as a criminal act. If any damage were done the appellant could have maintained an action; here, moreover, he killed the pigeon whilst flying. [BLACKBURN, J.—If he was justified in shooting it whilst on the ground he might kill it in the air. He would have no right to follow off his ground.] It is upon the same footing as shooting a dove (*Vere v. Lord Cawdor*, 11 East, 568.) [MELLOR, J.—That case turned upon the validity of a plea; here we have to do with the words in an Act of Parliament, and the question is what is the meaning of the word "unlawfully?"] He referred also to *Dew v. Sanders*: (Cro. Jac. 492.)

Hannen, for the appellant, contended that this was not a "unlawful killing" within the meaning of the statute: (*Rex v. Brooke*, 4 C. & P. 131; *Rex v. Cheafor*, 21 L. J. 43, M. C. That the statute does not mean to refer to any killing of pigeon which may not be justifiable, but such an improper killing as though it would not amount to larceny at common law, would nevertheless be in itself a criminal act. That as this was done in the assertion of a right, it was not a criminal act: (*Reg. v. Cridland*, 7 El. & Bl. 879; *Hannam v. Mockett*, 2 B. & C. 934, Bayley, J. judgment.)

MELLOR, J.—I cannot but think that the section means to refer to those cases which do not amount to larceny, but are still unjustifiable killing, not to cases where the killing is under claim of right.

Francis, in reply.

BLACKBURN, J.—I confess that I have entertained some little doubt upon the subject, but I think that upon a proper construction of the statute the appellant ought not to be convicted. The section in question is found in a statute "to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences;" and as far as this provision goes it is a re-enactment of a section in the previous Act of the 7 & 8 Geo. 4, c. 29, and the preamble recites that "it is expedient to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences;" and this leads to the inference that the offences contemplated by the statute are those *ejusdem generis* with larceny. Now the section as to pigeons follows immediately after that applicable to dogs and some other animals, and it imposes a penalty for unlawfully and wilfully killing, wounding, or taking any house-dove or pigeon under such circumstances as shall not amount to larceny at common law. Now, what is the kind of unlawful killing here referred to? There has been at times considerable difficulty in knowing whether the taking of pigeons under certain circumstances, where they are not taken from the pigeon-house, amounts to larceny; and it was to meet such cases that the section was framed. I think in this case that the farmer, who was protecti-

this crops, and who really thought he was doing a lawful act, cannot be said to have unlawfully killed the bird. The section must be taken in connection with the rest of the statute which applies to larceny; and, therefore, although I have entertained some doubts upon the subject, I think that the justices were wrong.

MELLOR, J.—There is no doubt that the words of the section are very wide, but the construction contended for on the part of the respondent would lead to very serious results, and I think cannot be applied to a case where a person kills a pigeon, as in this case, under a colour of right. There may, no doubt, be cases not amounting to larceny where, under circumstances showing a wilful and wanton intention, a party may be punishable under this section, and for these the section provides; but I do not think that the present case comes within it, and I think, therefore, that the conviction was erroneous.

Conviction quashed.

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COURT OF EXCHEQUER.

April 22 and 23, 1863.

(Before POLLOCK, C.B., MARTIN, BRAMWELL and WILDE, BB.)

MOULTON (Appellant) v. WILBY (Respondent).

Salmon Fishery Act 1861, 24 & 25 Vict. c. 109—Sects. 11 & 12—Appeal against conviction under sect. 12—Salmon cage—Fixed engine—Fishing weir or fishing mill dam—Fish pass—Ownership of fishery and mill dam in different persons—Construction of Act.

Appellant was owner of a fishery and a salmon cage, which cage was built upon a spur of mason work attached to the masonry of a weir or dam in the river Dee, belonging to another person, and over which dam appellant had no control. The cage was within fifty yards below the dam, which had no free gap or fish pass in it as required by sect. 12 of the Salmon Fishery Act 1861. The position of the cage was such that no fish could ascend or descend the river without getting into the cage from which subsequent escape was very difficult. The appellant's practice was to get the salmon out of the cage by means of a net, and it was admitted that this was a mode of fishing lawfully exercised by virtue of an ancient right at the time of the passing of the act of 1861. An information was laid against appellant for taking six salmon out of the cage by means of a net on the occasion in question, and the justices convicted him of an offence against the 12th section of the Act, in having caught salmon otherwise than "by rod and line within fifty yards below a dam not having a fish pass attached thereto" in accordance with the Act. On appeal to the Exchequer, the Court

Held, that the conviction was right.

First the salmon cage is not a "fixed engine" within sect. 11, and if it were, and although it was a mode of fishing lawfully exercised by virtue of an ancient right at the time of the passing of the Act, yet the proviso at the end of sect. 11, that it should not apply to "fishing weirs" or "fishing mill dams" takes it out of the operation of sect. 11 altogether, and that section consequently has nothing to do with the present question.

Secondly, the second heading or division of sect. 12 is an absolute prohibition of the catching of salmon by any one in any manner, "except by rod and line" in the head race or tail race of any mill or within "fifty yards below any dam, unless such mill or dam has attached thereto a fish pass" in the form prescribed by sect. 12. Nor can the provisions of the Act be evaded by the fact that the weir and the salmon cage belong to different owners. The conviction therefore was right under the second division of sect. 12 of the Act.

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Salmon Fishery,
Act, 1861.

THIS was an appeal against a conviction by justices of the peace for the city of Chester, under the Salmon Fishery Act, 1861.

The following case was stated by the justices under 20 & 21 Vict. c. 43, s. 2, for the opinion of the Court of Exchequer:—

Ralph Moulton, upon complaint of Joshua Wilby, was duly summoned to appear, on the 25th of July last, before us, the undersigned, two of Her Majesty's justices, &c., for that the said R. Moulton "did, on the 26th of May last, catch in the salmon cage, on the river Dee, in the city of Chester, and within fifty yards below a dam there existing, six salmon otherwise than by rod and line, contrary to the provisions of the 12th section of 24 & 25 Vict. c. 109." Upon hearing the complaint on the said 25th of July last, the before-mentioned parties appeared before us, accompanied by Mr. Bridgman, solicitor for the said J. Wilby, and Mr. Hostage, solicitor for the said R. Moulton.

It was proved by the complainant Wilby (the respondent), who was a watcher for the conservators of the river, that on the 26th of May last the defendant took, by means of a landing net, six salmon out of the salmon cage in which the fish were then impounded; that the salmon cage was within fifty yards below a fishing mill dam, such as is mentioned in sect. 4 of the said Act, on the river Dee; that the fishing mill dam had not a fish pass attached thereto, in accordance with the 12th section of the 24 & 25 Vict. c. 109; that the mode in which the salmon were taken was similar to that in use before the passing of the last-mentioned Act; that since the passing of the said Act bars had been placed in the salmon cage, which bars, when up, constituted a clear opening for salmon to pass through the cage, both up and down, according to the provisions of the 22nd section of the said Act; that the bars were up on the 26th of May.

For the defence, it appeared to our satisfaction, and it was admitted on the part of the complainant, that there was an ancient right of fishing in the aforesaid salmon cage, by charter, grant, or immemorial usage, which right had been purchased many years ago by one Mr. Topham, from whom it descended to the present owner, Mr. Robert Topham, whose tenant the defendant Moulton was before and on the said 26th of May; and under which charter, grant, or immemorial usage the said defendant and previous tenants of Mr. Topham had lawfully fished, and been used to fish, before and until and at the time of the aforesaid Act. It was not disputed that defendant Moulton was Mr. Topham's tenant, and as such tenant was licensed by Mr. Topham (if Mr. Topham had

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the power to give such licence by law) to do the act complained of.

Upon the above facts we were of opinion that the matter of the said complaint had been proved against the defendant Moulton, and we convicted the said R. Moulton of an offence against the 12th section of the said Act of 1861, and adjudged him to pay a penalty of 5s. for his said offence, and also adjudged him to pay 1s. for each salmon so as aforesaid taken.

The question for the Court is, whether upon the facts stated the justices were justified in convicting the appellant as aforesaid.

By the plan, annexed to and forming part of the case, it appears that a weir or mill dam stretches diagonally across the river Dee, commencing at the left bank of the river some distance above the Old Dee Bridge and reaching to the right bank of the river close to the same bridge. At the lower end of such weir, next the bridge on the right bank, are the Dee Flour Mills, which, together with the weir, belong to a Col. Wrench. At the higher end of the weir, on the left bank of the river, there are other mills now belonging to Mr. Topham, who purchased them, together with the fishery and salmon cage, some years ago of Col. Wrench, to whom before such purchase all the mills and the weir, together with the fishery and the salmon cage, belonged as sole proprietor of the whole. The weir or dam causes the water to fall many feet, and when the water is lower than the top of the weir, its only escape is the aperture at the higher end of the weir (between it and the mills on the left bank), where there is a large water-wheel for working the mills, and a floodgate to regulate the supply and passage of the water to the mills. Connected with and running out from the higher end of the weir, at right angles to it, in a direction down the river towards the bridge, is a block of masonry called a "spur," several yards long. The salmon cage, which is some yards below the said water-wheel and floodgate, is built on this spur on the one side and on the other on a sunken wall of masonry connected with the left bank. Over the water-wheel or through the floodgate, in which the wheel is placed, the water flows between solid masonry until it reaches the salmon cage, through or under which it flows on to the stream below, and all fish ascending the river to spawn, or passing back again down the river, have to pass through the above-mentioned aperture: in making for which upwards, or passing from which downwards, they must necessarily pass through the salmon cage, the receding bars of which are placed in such manner that, having passed through them into the cage, they find themselves in a trap, from which escape into the river is very difficult.

The following sections of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), were referred to in the argument and judgment.

By sect. 4 (interpretation clause) the term "dam" shall mean all weirs and other fixed obstructions used for the purpose of damming up water. "Fishing weir" shall mean a dam used for the

lusive purpose of catching or facilitating the catching of fish. "Fishing mill dam" shall mean a dam used, or intended to be used, wholly or partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes. "Fixed engine" shall include stake-nets, bag-nets, dredges, putchers, and all fixed implements or engines for catching, or facilitating the catching of fish.

sect. 11. No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; and any engine placed or used in contravention of this section may be taken possession of or destroyed; and any engine so placed or used, and any salmon taken by such engine, shall be forfeited, and in addition thereto, the owner of any engine placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty not exceeding 10*l.*; and for the purposes of this section, a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine; but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act, by any person by virtue of any grant or charter or immemorial usage; *provided always, that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams.*

sect. 12. The following regulations shall be observed with respect to dams:

(1.) No dam except such fishing weirs and fishing mill dams as are lawfully in use at the time of the passing of this Act by virtue of a grant or charter or immemorial usage, shall be used for the purpose of catching, or facilitating the catching of salmon:

1. Any person catching or attempting to catch salmon in contravention of this Act, shall incur a penalty not exceeding 5*l.* for each offence, and a further penalty not exceeding 1*l.* for each salmon which he catches:

2. All traps, nets and contrivances used in or in connection with the dam for the purpose of catching salmon shall be forfeited:

And no fishing weir, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon, unless it have therein such a gap as is hereinafter mentioned. And no fishing mill dam, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon, unless it have attached thereto a fish pass of such form and dimensions as shall be approved of by the Home Secretary, nor unless such fish pass has constantly running through it a flow of water as will enable salmon to pass up and down the pass, but so nevertheless that such pass shall not be larger or deeper than requisite for the above purposes:

(2.) *No person shall catch or attempt to catch, except by rod and line, any salmon in the head race or tail race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish pass of such form and*

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dimensions as may be approved by the Home-office, and such a fish pass has constantly running through it such a flow of water as will enable salmon to pass up and down it; and any person acts in contravention of the foregoing provisions

1. He shall incur a penalty not exceeding 2*l.* for each offence, and a further penalty not exceeding 1*l.* for every salmon so caught:
2. He shall forfeit all salmon caught in contravention of this section, and *all nets or other instruments used or placed for catching the same.*

By sect. 21, no person is to fish during weekly close time otherwise than with a "rod and line," and any one acting in contravention thereof is to forfeit all fish taken, and "*any net or moveable instrument used by him in taking the same,*" in addition to a pecuniary penalty.

McIntyre, for the respondent, in support of the conviction.—The clear intention of the Act was to prevent any one from fishing or taking fish in any other way than with rod and line in the head or tail race of any mill, or within fifty yards below any dam not having attached to it a fish pass as described in sect. 12. There was here a taking of salmon in direct contravention of the second clause of the 12th section of the Act. The appellant will contend that the taking was complete when the fish were in the cage, and that the cage is a "fixed engine" within sect. 11, and being part of a "fishing weir" or "fishing mill dam" is protected by the proviso in that section. But that argument will not avail, for sect. 11 has no bearing on the case. By that proviso "fishing weirs" and "fishing mill dams" are not to be taken as "fixed engines." The plan, which is part of the case, shows that the salmon cage formed part of the dam, but the taking was not complete until the fish were taken out of the cage by the net. The cage was a "*facilitating* of the catching," and although an ancient and lawful mode before the Act, yet it came within the second part of the first division of the 12th section, which enacts, that no fishing weir or fishing mill dam, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it have therein such free gap or fish pass as the Act requires. Again, the conviction is supported by the express words of the 2nd clause of sect. 12, that no fish are to be taken "except by rod and line in the head race or tail race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish pass," such as the Act directs. [POLLOCK, C.B.—Suppose, instead of a net, he had used a "rod and line" to get the fish out of the cage?] He would still have been liable, for the impounding them in the cage would have been an unlawful *facilitating* within the Act. [MARTIN, B.—Is this a "fishing weir" or a "fishing mill dam" within the Act?] It is submitted that it clearly is a "fishing mill dam" under sect. 4. The cage is bounded on each side by the dam, the sole operation of which is, that except into this narrow trap there is no passage for the fish.

The case finds it to be a "fishing mill dam" without a fish pass, and that fish were caught within fifty yards of it otherwise than by "rod and line." How then can it be said not to be within sect. 12 of the Act?

E. Beavan for the appellant *contra*.—The effect of sustaining the conviction will be to take away valuable property from the appellant without any compensation, and the Court will not do that unless they see that the language of the Act is very clear. The question is, whether the salmon cage is a lawful mode of getting the fish. The case finds it to be an ancient mode similar to that in use before the Act, and that there was an ancient right of fishing in the said cage by charter, grant, or immemorial usage. It was therefore lawful within and expressly secured by the 11th section. As to the proviso that sect. 11 is not to apply to fishing weirs or fishing mill dams, it is submitted that this is not either a "fishing weir" or "fishing mill dam," but a "fixed engine." The case does not find it to be part of the mill dam, but, on the contrary, it is found to be several yards below. **BRAMWELL, B.**—It is manifest that if the dam were not there the fish would not enter the cage, but swim past it. Does it not then come within sect. 12? It is a "fixed engine" under sect. 11, but being in lawful use by ancient right it is expressly exempted from the operation of the Act; the taking was complete when in the cage, and it cannot be an offence under sect. 12. But even if not protected as a "fixed engine" under sect. 11, appellant cannot be convicted under sect. 12. That section consists of two parts; the first relating to dams and fixed engines, and fishing by nets, &c., within a dam, which this is not. The second part, under which this information is framed, is confined to fishing by nets and other instruments *ejusdem generis*, namely, "moveable instruments," as contradistinguished from "fixed engines" such as this salmon cage. [**WILDE, B.**—The 11th section does not, and the 12th section expressly does, apply to dams. The first part of the 12th section cannot, I think, apply to the person of whom the dam does not belong. The second part of that section, however, is more general, and my difficulty is to see how any one catching salmon in any way but by "rod and line" within the prohibited distance of any dam not having the requisite fish pass, can escape the operation of the second part of this section.] It is contended that that does not apply to "fixed engines." By sect. 11, which deals with fixed engines and permanent structures such as this salmon cage, such engines are to be taken possession of and destroyed; and sect. 20 directs the removal of fixed engines in the close season. But by sect. 12 "all nets and other instruments" are to be forfeited. Where they are moveable they are to be forfeited and carried off; where fixed, to be destroyed. How could this cage, which is fixed to the freehold, be forfeited and carried away? Sect. 21 supports this view. **WILDE, B.**—A net which is staked down is affixed to the freehold.] Sect. 21 makes special provision for the taking of forfeited

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nets. [WILDE, B.—Sect. 21 makes rather against your present argument. It says, “nets or moveable instruments;” but sect. says, “nets or other instruments used or placed,” &c.] Again, appellant was not the owner of the dam, and had no power to affix a fish pass to it. It would be a great hardship and injustice if the ancient right, for which appellant has paid a large sum, taken from him without any compensation, because the dam has not the pass which appellant has no power to compel the owner to affix to it. [BRAMWELL and WILDE, BB.—It clearly is the intention of the Legislature to get rid of these obstacles as public nuisances, and to give the fish free room to go up the river.] That may be; but it was also their object to protect vested and immemorial rights. [BRAMWELL, B.—And salmon also.] Sect. 11 expressly saves all ancient rights of fishing. [WILDE, B.—Yes; but not fishing by means of these dams. They are expressly excepted from the operations of sect. 11, and brought within that of sect. 12.]

McIntyre in reply.—The preamble shows the Act must be construed with reference to its object, viz., the preservation of salmon, and the provisos relative to certain instruments are to be construed strictly and not widened. The plan shows the cage to be on the spur, the only object of which is to guide the fish into the cage. By sect. 20, the spur is to be of a certain length, and to be legal must have a fish pass. Sect. 11 is a general section, destroying all “fixed engines,” wherever placed; but then comes the proviso, and says that the section which would destroy all fixed engines shall not affect this one, as it is part of a fishing mill dam. [MARTIN, B.—In my opinion, the 11th section has nothing to do with this case. But there is the 12th section. The first branch of that section applies, in my opinion, to the case where the owner of the fishery has also control over the “fishing weir;” and it seems to me that unless the “fishing mill dam” belongs to the owner of the fishery, he does not use it in the way contemplated by the section. Here the owner of the cage has no control whatever over the “fishing mill dam.”] The second clause of the 12th section is an absolute enactment that, unless there is a fish pass, no one can fish there in any manner whatever. There is no difference between a fixed and a moveable engine, and if the owner of the fishery cannot get the owner of the dam to make a fish pass, and the Home-office will not help him, then his fishery is gone. If not, it would be easy to avoid the operation of the Act by a severance of the dam from the fishery. If sect. 11 does not apply, the latter part of sect. 12 does; and no mode of fishing, whether by moveable or fixed engines, can be used by any person within fifty yards below any mill dam, which has not the proper fish pass affixed to it.

POLLOCK, C.B.—We are all agreed in thinking that the appeal in this case must be dismissed, and that the conviction was right. The 11th section of the Salmon Fishery Act, 1861, does not apply and has nothing to do with the present question. That section is

directed against "fixed engines," and contains a proviso that it shall not affect any ancient right, or mode of fishing as lawfully exercised at the time of the passing of the Act, by any person by virtue of any grant, or charter, or immemorial usage." There is no doubt that the mode of fishing against which this information is laid is one that was sanctioned by immemorial usage, and, had the Act stopped there, it would no doubt have been a lawful mode of fishing within sect. 11; but then the proviso says that "nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill dams," which takes the whole matter out of the operation of sect. 11 altogether. Then comes the 12th section, which says that "no person shall catch, or attempt to catch, except by rod and line, any salmon in the lead race or tail race of any mill, or within fifty yards below any dam, unless such mill or dam has attached thereto a fish pass of such form and dimensions as may be approved by the Home-office," &c., and it proceeds to inflict penalties on any person acting in contravention of the foregoing provision. That is an absolute prohibition. Now, this weir or dam had no such fish pass as the Act requires; nothing, in short, enabling the fish to pass up and down the river freely; and the fish were caught otherwise than by rod and line. There was therefore a catching of fish by prohibited means, in a prohibited part of the river, and consequently the conviction was right, and the appeal must be dismissed.

MARTIN, B.—I am entirely of the same opinion. Although at one time I had a doubt upon the matter, I am now convinced by Mr. McIntyre's argument, and satisfied that he is right in his construction of the statute, that the second heading or division of the 12th section is an absolute prohibition to the catching of salmon in any manner, *except by rod and line*, within the prescribed part of the river, unless there be the fish pass required by the Act. And, even if the owner of the mill dam refuses his consent to such fish pass being attached thereto, and such fish pass cannot be obtained, the owner of the fishery is nevertheless absolutely prohibited. Looking at the 23rd and 24th sections, however, it is clear that the owner of the fishery may get a free pass, contrary to the wish of the owner of the dam, if the Home-office will give him their assistance. The conviction must be affirmed.

BRAMWELL, B.—I agree with the rest of the court in thinking that this conviction was right. But, first, I would say that I agree with what my brother Martin said in the course of the argument, and my Lord in his judgment, that sect. 11 does not apply to this case, and has nothing to do with "fishing weirs" or "fishing mill dams," or anything connected with them. The 12th section applies to dams, and that section is headed thus: "The following regulation shall be observed with regard to dams." It then proceeds to prohibit, in the first place, the use of all dams for the purpose of catching or facilitating the catching of salmon,

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"except such fishing weirs and fishing mill dams as are lawfully in use at the time of the passing of the Act, by virtue of grant," &c.; and then it proceeds to enact, "that no fishing weir, although lawfully in use as aforesaid, unless it have therein a fish pass, gap," and "no fishing mill dam, although lawfully in use as aforesaid, unless it have attached thereto a fish pass as therein described, shall be used for the purpose of catching salmon." Now, this fishing mill dam, and the contrivance connected therewith, had not any fish pass attached to it. My brother Martin seems to doubt whether a weir can be said to be used for the purpose of catching fish where the ownership of the weir and of the fishery is in different persons. It may be that that is doubtful question; but my own notion is that it can be, although the two things do not belong to the same person, for it is clear that if the dam were not there the salmon cage would be useless the fish would swim by and not enter the cage; but being there its effect is to drive the fish into the cage. The provisions of the Act cannot, I think, be evaded by the fact that the weir and the cage belong to different owners. The difficulty, to my mind, in the construction contended for by the respondent was, that where possibly, as is said to be the case in the present instance, the weir or a large part of it, belongs to a person who is not also the owner of the fishery, it would be taking away a valuable right from the owner of the fishery without any compensation. But the doubt which, together with my brother Martin, I at one time entertained on that point has been set at rest by Mr. McIntyre's argument, and he has satisfied both me and my brother Martin that it is forbidden by the Act to any one to fish in any manner, except with rod and line, within fifty yards below any mill dam that has not a fish pass. It is clear, therefore, that the Legislature did not shrink from doing what has been argued to be so great a hardship and injustice. It will, however, I think, be found in the long run that there is no hardship in restraining these particular rights. I have no doubt the conviction was right, and the appeal must, therefore, be dismissed.

WILDE, B.—I am of the same opinion. The appellant is in this alternative. This engine is either a part of the dam or it is not; if it is, then it becomes a "fishing mill dam" that has been used for fishing purposes without a fish pass, in contravention of the first branch of the 12th section. If it is not a part of the dam, then the appellant comes within the second division of the 12th section, as having caught fish otherwise than by rod and line within fifty yards below a dam not having a fish pass attached to it. The case clearly falls within the second, if not within the first, branch of the 12th section.

Conviction affirmed.

COURT OF COMMON PLEAS.

April 30, 1863.

(Before ERLE, C. J., WILLES, BYLES, and KEATING, JJ.)

HODGSON (Appellant) v. LITTLE (Respondent).

Salmon Fishery Act 1861, 24 & 25 Vict. c. 109—What is a fishery within the meaning of sect. 20—Obstructions to free passage of fish.

The occupier of a fishing mill dam removed the hecks, but left the remainder of the contrivances for catching salmon, by which means the fish were stopped from going up the river. Without the hecks the fishery was not available :

Held, that the fishery did not cease to be a fishery because part of the machinery for catching fish had been removed, and that the occupier had been rightly convicted, under sect. 20, for not removing obstructions to the free passage of fish during the close season.

CASE stated by justices of the county of Durham, under the 20 & 21 Vict. c. 43.

At a Petty Sessions holden at Darlington, in the county of Durham, on the 20th day of October, 1862, before George John Scurfield, Robert Colling, James Cookson, and Joseph Whitwell Pease, Esqrs., four of Her Majesty's justices of the peace acting in and for the said county, an information, preferred by Robert Little (hereinafter called the respondent) against Joseph Hodgson (hereinafter called the appellant), under sect. 20 of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), charging for that on the 8th of September last, at the township of Dinsdale, in the said county of Durham, he, the said appellant, then being the occupier of a certain fishery for salmon in the river Tees, did not within thirty-six hours after the commencement of the close season, as fixed by the Salmon Fishery Act, 1861, cause to be removed and carried away from the waters within his fishery, the inscales, hecks, tops and rails of all cruives, boxes, or cribs,

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and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery, and in such default for the space of (to wit) fourteen days, did continue contrary to the form of the statute in such case made and provided, was heard and determined by us, the said parties respectively being then present, and upon such hearing the appellant was convicted before us of the said offence, and we adjudged him to forfeit all the engines and other things, to wit, the locks, sluices, gates or doors that were not removed and carried away in compliance with the said section, and for every day, to wit, fourteen days during which he had suffered such things to remain unremoved beyond the period prescribed by the said Act to the sum of 1*l.*, and also to pay to the respondent the sum of 5*l.* 13*s.* for his costs in that behalf. And, whereas, the appellant, being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, hath, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this Court, and hath duly entered into the recognizances as required by the said statute in that behalf. Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:—

Upon the hearing of the said information it was proved that during the times hereinafter mentioned the appellant was a corn miller, occupying as tenant, and for the purposes of his business, a corn mill, close by the fish-locks hereinafter mentioned, and that the fishing mill dam and locks hereinafter mentioned were used for the double purposes of fishing and of supplying water for the purposes of the said mill. That the Dinsdale fishing mill dam extends across the river Tees, and is of such height that when the river is in an ordinary state, salmon passing up the river can rarely, if ever, leap over it, and are frequently seen attempting to do so in vain. That at the end of the dam, on the Durham shore, there is an opening, which is locally termed a fish-lock. It was also proved that on the up-stream side of the fish-lock two grooved openings, of the width of about three feet each, are found. In the grooves of each of these openings a moveable sliding door, formed of wood and iron, is placed, which can be raised or lowered in the grooves at pleasure. When these doors are down, as it was proved they were on the 8th of September last, and on thirteen subsequent week days, no salmon can pass through the fish-lock. Within the lock, and at a distance of about three feet from the sliding doors down the stream, another frame is placed, in which, when the fish-lock was used for taking salmon, hecks were placed, the door above being opened. It was proved that these hecks had been used by the appellant during the last fishing season up to the 19th of May last, when

y were removed; but that, on the said 8th of September, and the said thirteen subsequent days, the doors were neither moved nor drawn up out of the water, and, consequently, an insurmountable obstruction was presented to the free passage of salmon through the lock. It was also proved that a similar fishery, with similar grooved doors and hecks, existed at the York-end of the dam; and that the circumstances already described in reference to the lock at the Durham end of the dam were equally applicable to this. That it was proved that the locks in question were used by the appellant for taking salmon during the fishing season, and up to the said 19th of May last, when he discontinued using them, by an order from his landlord's agent, upon the representations of the inspectors of salmon fisheries that the locks were not in accordance with law, and that they had remained in the same state as they were when so used, except that the hecks had been taken out, but no proof was given that the locks had been actually used for the purpose of catching salmon after the said 19th day of May, and that what had been removed were the doors above described. It was also proved that *locks* and *cruives* were synonymous terms. For the appellant, it was contended that the lock was not, on the said 8th of September, or other subsequent days, a fishery for salmon, or a crib, or *cruive*, within the meaning of the section under which the information was laid, and that it was a fishing mill dam not used for fishing, but for the purposes of the mill only, after the said 19th of May, the use of which was regulated by other sections of the Act. It was also contended on behalf of the appellant, that the appellant, if otherwise liable to penalties under the said 20th section, was not so, inasmuch as the removal of the doors would injure the milling power. We being of opinion that the evidence given before us aforesaid proved that the appellant was the occupier of the fishery, and that the case was within the operation of the said 20th section of the Salmon Fisheries Act, 1861, gave our determination against the appellant in the manner before stated.

If the Court should be of opinion that the said conviction was lawfully and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the Court should be of opinion otherwise, then the said information is to be dismissed. *Manisty*, for the appellant.—By sect. 4 the following, amongst other definitions, are given;—"Dam" shall mean all weirs and other fixed obstructions used for the purpose of damming up water. "Fishing weir" shall mean a dam used for the exclusive purpose of catching or facilitating the catching of fish. "Fishing mill dam" shall mean a dam used, or intended to be used, partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes. By sect. 17 close time is to be kept from the 1st of September to the 1st of February. By sect. 20 proprietor or occupier of every fishery for salmon shall, within

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thirty-six hours after the commencement of the close season, cause to be removed and carried away from the waters within his fishery, the inscales, hecks, tops and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery; and if any proprietor or occupier omits to remove and carry away in manner aforesaid anything hereby required to be removed and carried away, he shall incur the following penalties, that is to say: First, he shall forfeit all the engines or other things that are not removed and carried away in compliance with this section. Second, he shall, for every day during which he suffers such things to remain unremoved beyond the period prescribed by this Act, pay a sum not exceeding 10*l*. It is submitted that a lock is not a temporary fixture, but a fixture fastened to the freehold. Under sect. 23, any proprietor of a fishery, with the written consent of the Home-office, may attach to every dam existing at the time of the passing of this Act, a fish pass, of such form and dimensions as the Home-office may approve, so that no injury be done to the milling power, or to the supply of water to or of any navigable river, canal, or other inland navigation by such fish pass. Next, I submit, that the hecks having been removed, and the fishery having been given up, it is no longer a fishing mill dam, but only a mill dam. If the proprietor of the fishery desire to let the fish go up the river he can do so by constructing a fish pass under sect. 23. He has mistaken his remedy.

Davison (with him *Fowler*) for the respondent.—The clear object of the Act of Parliament is to give a free run to the fish. The Legislature says that where there is a dam something shall be done to let the fish pass. With regard to a dam only, such as a mill dam, the owner of the fishery above may, under sect. 23, have a fish pass placed. With regard to fishing mill dams, sect. 12 says, that they shall not be used for the purposes of catching salmon, unless they have attached to them fish passes. I submit that this is a fishery properly so called. Is this sluice one whit less part of the fishing machinery than the hecks?

ERLE, C. J.—The appellant, the occupier of a mill and a fishing mill dam and fishery, was convicted under sect. 20 of the 24 & 25 Vict. c. 109, for not removing obstructions to the free passage of fish through the locks of his fishery. It appears that the appellant had a mill, and what I think was a fishery within the meaning of the statute—the substantial contrivances for the taking of fish. Sect. 20 says, that the occupier of every fishery shall, within thirty-six hours after the commencement of the close season, cause to be removed all obstructions to the free passage of fish through the locks within his fishery. It seems to me that the conviction applies directly to the words of that section. The contrivance was what I would call hatches and hecks. The hatches had been kept, although the hecks had been taken away; but the whole was in use in May last. The fishery was

now no longer available, because the hecks had been taken away. But the appellant kept down the hatches, which was part of the contrivance for taking the fish, and it is found as a fact that when the hatches were down no fish but an extraordinary gifted animal could pass. It seems to me clear that the Legislature meant that a free passage should be left for the fish. It provides that, for the future any mill dam to be made must leave a passage; and as to the old mill dams, if altered, the party altering must leave a free passage for fish. The appellant has an old fish dam, and he says that, by taking away part of his engines, he has turned the whole into a mere mill dam. The grand question tried is, the right to stop the fish passing up the river. I think the conviction was right.

WILLES, J.—I am of the same opinion. The substantial question is, whether sluices are obstructions to the free passage of fish in a fishery. The Legislature has given no construction to that term “fishery.” Must it be a fishery that is actually being used as such? I think not. It must mean that which is by its nature capable of being used as machinery for catching fish, for otherwise, at the close season, the owner might take away part of his machinery, and say that he was not an owner of a fishery, which would be absurd. The words are very large, “all obstructions.” It appears to me clear that this is a fishery, and that a sluice is an obstruction.

BYLES, J.—This is a remedial Act, and ought to be construed liberally, so as to suppress the mischief which it was intended to cure. If this is not a fishing mill dam, it is a mill dam, and it falls within the 25th section, for the appellant has altered it so as to create a total obstruction. To hold, then, that this is not a fishery, would only be to alter the remedy. Here there was a complete apparatus for fishing. There is no reason why it should not be used so to-morrow. Although part of the machinery has been removed, it might be restored to-morrow.

KEATING, J.—I am of the same opinion. I think this is a fishery. The only question is, whether the free passage of the fish has been obstructed.

Conviction affirmed.

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CENTRAL CRIMINAL COURT.

October 30, 1862.

(Before the LORD CHIEF BARON POLLOCK.)

REG. v. GARDNER AND HUMBLER. (a)

*Opening statement of counsel—Joint charge against two prisoners—
Course to be pursued.*

*The counsel for the prosecution opening no case against one prisoner,
statements made by that prisoner not to be used except in a regular
way of evidence.*

SAMUEL GARDNER and Elizabeth Humbler, were indicted for the wilful murder of Elizabeth Gardner.

Poland (Besley with him), for the prosecution.

Ribton (Orridge with him), for the prisoner Gardner.

The two prisoners were committed for trial on the charge of murder, and a true bill was found by the Grand Jury.

Poland, in opening the facts of the case to the Jury, stated, that as against the female prisoner the case was hardly one in which he could expect a conviction, and was about to detail to the jury some statements made by her, whereupon the Chief Baron interposed, and said, "if there were no case against her, statements made by her ought not to be repeated to the jury, merely because both prisoners were jointly charged. Such a course would, whilst complying with the forms of justice, violate it in substance. He would, however, speak to the Recorder upon the matter." Upon his return, he stated, that after consulting that learned judge, he considered that if the counsel for the prosecution deemed it desirable that the statements should be laid before the jury, the proper course would be to take an acquittal as against the female prisoner, and examine her as a witness.

Poland.—I will at once adopt that course.

The female prisoner was called and gave evidence for the prosecution. *Guilty.*

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

CENTRAL CRIMINAL COURT.

March 2, 1863.

(Before the RECORDER OF LONDON.)

REG v. BUCKWELL. (a)

Bankrupt—Non-surrender to pass last examination—Notice—24 & 25 Vict. c. 134, s. 221—Adjournment of meeting by registrar.

A registrar of the Court of Bankruptcy, as deputy for a commissioner, adjourned a meeting for last examination of bankrupt, and the notice of adjournment recited that the meeting was "before Mr. Commissioner Fonblanque." Notice of such adjournment was endorsed on the order of protection, and the paper was given back to the bankrupt.

It was held, the notice of adjournment was not properly entitled, the registrar being the only person presiding, and that a mere memorandum endorsed on the order of protection was not such a notice as is required to be served upon the bankrupt under sect. 221 of 24 & 25 Vict. c. 134, informing him of the day allowed him for finishing his examination, the non-compliance with which (notice being duly given) is made a misdemeanor by the section last-mentioned.

WILLIAM BUCKWELL was indicted for that he having been duly adjudged a bankrupt did omit and neglect to surrender himself to the Court of Bankruptcy on the day limited for his surrender, with intent to defraud his creditors.

The defendant pleaded Not Guilty.

Metcalf (Sargood with him), for the prosecution.

Hardinge Giffard (F. H. Lewis with him), for the prisoner.

The indictment was as follows:—

Central Criminal Court } The jurors for our Lady the Queen upon their
to wit. } oath present, that before and at the time of
committing the offences hereinafter mentioned, William Buckwell was
duly adjudged bankrupt within the meaning of the laws relating to bank-
rupts in England, to wit, on the 4th of February, A.D. 1862, by the
Court of Bankruptcy in Basinghall-street, in the city of London, the
said Court of Bankruptcy then and there having jurisdiction to act and
proceed in the matter of the said bankruptcy, and that the said Court
of Bankruptcy did duly cause notice of the said adjudication to be given
in the *London Gazette*, and did thereby appoint a public sitting of the

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

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said Court for the bankrupt to surrender and conform, to wit, on the 22nd of February, A.D. 1862, and that notice in writing of such day was also duly served upon the said William Buckwell, and that upon the said day a day was fixed for the last examination of the said William Buckwell, to wit, the first day of April in the year of our Lord one thousand eight hundred and sixty-two, and that of such last mentioned day notice was also given in the said *London Gazette*, and notice in writing was also served upon the said William Buckwell, and that upon the last mentioned day the examination of the said William Buckwell was further adjourned by the same Court to the twenty-third day of April in the same year, and was then also duly adjourned to the fourteenth day of May in the same year, of all which adjournments the said William Buckwell then had due notice that the said William Buckwell surrendered and submitted to be and was examined by and before the same Court upon the days hereinbefore mentioned, except upon the day last fixed by the said Court as aforesaid, to wit, the said fourteenth day of May; but that notwithstanding such notices in the *Gazette* as hereinbefore mentioned, and such notices in writing served upon the said William Buckwell as hereinbefore mentioned, and after such notice to the said William Buckwell of the said several adjournments, and of the said fourteenth day of May, so being fixed by the same Court for the further examination of the said William Buckwell, the said William Buckwell, within the jurisdiction of the Central Criminal Court, unlawfully and with intent to defraud and to defeat the rights of his creditors, did not surrender himself to the said Court of Bankruptcy or submit to be examined and did not attend to finish, and did not finish his said examination, he the said William Buckwell having no lawful impediment allowed by the said Court, but absented himself from the said Court and wholly omitted and neglected to present himself before the said Court to finish his said examination against the form of the statute, &c., and against the peace, &c.

Second Count.—That before and at the time of committing the offence hereinafter mentioned the said William Buckwell was duly adjudged bankrupt within the meaning of the laws relating to bankrupts in England, to wit, on the fourth day of February in the year of our Lord one thousand eight hundred and sixty-two, by the Court of Bankruptcy in Basinghall-street in the city of London, the said Court of Bankruptcy then and there having jurisdiction to act and to proceed in the matter of the said bankruptcy, and that after the said William Buckwell had been so adjudged bankrupt as aforesaid, a certain hour upon a certain day was allowed by the said Court for finishing his examination, to wit, the fourteenth day of May in the year aforesaid, and that due notices of the said hour, upon the said day being allowed by the said Court as aforesaid were given, and that after notices had been given in the said *London Gazette* and to the said William Buckwell as in the first count mentioned, the said William Buckwell, within the jurisdiction of the Central Criminal Court, unlawfully, and with intent to defraud and to defeat the rights of his creditors, did not submit to be examined before the Court of Bankruptcy aforesaid on the said fourteenth day of May, or at any time subsequently, he the said William Buckwell having no lawful impediment allowed by the said Court, but wholly neglected and omitted so to do against the form, &c., and against the peace, &c.

A short statement of the facts of this case will be necessary. It appears that the defendant was adjudicated a bankrupt on the

February, 1862, and surrendered to his bankruptcy on the 5th. The choice of assignees took place on the 22nd same month. A meeting for his examination was appointed the 1st of April. On that day he attended and the following *randum* was made:—"The bankrupt not having yet filed his *nts*, and stating that his books and vouchers were in Italy, that he could not prepare his accounts until they had been *ver*, the examination was adjourned till the 23rd of April at *ast* 12 precisely." On the 23rd of April the bankrupt had *ed* his accounts and was not prepared to pass his last exami-
l, whereupon the examination was adjourned till the 14th of

The proceedings up to this time had been before Mr. Commissioner Fonblanque (who also directed this prosecution), on this 23rd of April Mr. Registrar Hazlitt, who is one of the *rars* of the Court of Bankruptcy attached to the Court of Commissioner Fonblanque, acted as deputy for the commis-
s, as appeared by the order of adjournment. In this order *ords* "before Mr. Commissioner" were struck out by Mr. *tt* himself, and inserted in their place was, "before Mr. *trar* Hazlitt." These words were again struck out and *re* Mr. Commissioner Fonblanque" were left. Mr. Regis-
lazlitt stated in his examination that the meeting of the 23rd *ril* was not before Mr. Commissioner Fonblanque, because *at* day the learned commissioner was absent from ill health, *e* acted as his deputy under the 27th section of the 12 & 13 *c.* 106, which provides, "That any registrar of the Court during vacation or during the illness or absence from any reasonable cause of any commissioner thereof, act for and as *eputy* of such commissioner, and any such registrar so acting *have* and exercise all power vested in the Court, except the *: of* commitment, the hearing of any disputed adjudication, or *earing* or determining of any question of the allowance or *nsion* of any bankrupt's certificate." The bankrupt did not *r* on the 14th of May or at any time after, hence the present *ution*.

fard, at the close of the case for the prosecution, submitted the defendant could not be convicted on this indictment. *e* are two objections. First, the Registrar, whose powers and *iction* is defined by the 52nd sect. of the 24 & 25 Vict. *4*, had no power to adjourn the meeting of the 23rd of *. That* section says,—“The registrars of the Court of Bank-
y shall have power to make adjudication of bankruptcy, to *ve* the surrender of any bankrupt, to grant protection, to *the* last examination of any bankrupt in cases wherein the *nees* and creditors do not oppose, to hold and preside at *ings* of creditors, to audit and pass accounts of assignees, and *in* chambers, and despatch there such part of the adminis-
ve business of the Court, and such uncontested matters as *be* defined in general orders, or as the commissioner in any *ular* matter shall direct; but nothing herein contained shall

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empower a registrar to commit, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge. *The registrar may adjourn any matter coming before him for the consideration of the commissioner.*” If he possessed a power of adjournment it was for a something “for the consideration of the Commissioner,” and not as he seems to have acted here. Again, the document setting forth the adjournment is headed “Before Mr. Commissioner Fonblanque;” that is struck out, and “Mr. Registrar Hazlitt,” is inserted, subsequently, Mr. Commissioner Fonblanque’s name is again put in, and concludes thus:—“Whereupon I, Mr. Commissioner Fonblanque,” (the name last mentioned) “do adjourn the examination, &c.,” and that is signed “William Hazlitt, Registrar.” So the Commissioner, upon the face of the document, would seem to be the power presiding, and an order is made and signed by some one else. Another objection is that the non-surrender here proved is not of the nature contemplated by the Act. The misdemeanor is the case of a bankrupt who does not submit himself *at all* to the jurisdiction of the court. In *Reg. v. Kenrick* (1 Cox Crim. Cas. 146), Erle, J., said: “Either at the day for the first examination, or at the last, the bankrupt is bound to surrender, but if he has surrendered at any time, he has complied with the terms of the Act of Parliament.” There is still another objection. The 221st section of 24 & 25 Vict. c. 134, enacts that “if he (the bankrupt) shall not, upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, *after notice thereof in writing, to be served upon him personally or left at his usual or last known place of abode or business*, and after the notice herein directed in the *London Gazette*, surrender himself to the Court (having no lawful impediment allowed by the Court), and sign or subscribe such surrender, and submit to be examined, &c.” To make the offence “notice in writing must be served, &c.” Here it has simply been shown that an order of protection was given to the bankrupt on the day of his surrender, and endorsed upon that paper is a memorandum of the adjournment of the meeting. It is true that is said to have been returned to the bankrupt, but even if it were that could hardly be construed into a “written notice of the day allowed him for finishing his examination,” as directed to be served by the section just quoted.

Metcalf (Sargood with him).—The first objection cannot be sustained because the Registrar may act either under the powers given him by the 52nd section of 24 & 25 Vict. c. 134, and so adjourn the meeting, or do so acting as deputy, under sect. 27 of 12 & 13 Vict. c. 116, with the powers of the Commissioner, subject to the limitations. In the latter case the proceedings would be properly described as taking place before the Commissioner, i.e. before the Court, as proceedings before a master are entitled as before the Court of Queen’s Bench. If there be any doubt as to that part of the case the heading and recitals might be struck out and the

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ment by the Registrar would be a good and valid adjourn-

RECORDER.—The only evidence of the adjournment is a singular document. If it were a hearing before the court the registrar would not have power to adjourn. It appears that it was “before Mr. Commissioner Fon-

—The bankrupt was aware of the adjournment, being at the meeting on the 23rd of April, and the document is of secondary evidence, which is in the bankrupt’s possession which states that the 14th of May is fixed for his last trial. Notice having been given of the two first meetings, and by the Act upon that trial, a verbal notice to the bankrupt would be sufficient. Although he has surrendered from time to time he has not *surrendered himself to the Court for finishing examination.*

RECORDER.—I think the objection is fatal. The bankrupt has surrendered from time to time although he has not passed examination and was not in a condition to do so. But supposing he was required to attend a further examination, having already submitted from time to time to be examined, I think formal and express notice ought to have been given to attend. As to the adjournment, as it appears upon the record put in, I think the objection made sustainable. There is nothing recorded to be “before Mr. Commissioner Fon-

—” who makes no order whatever. The order is made by the person. In order to convict upon this indictment it must be proved that there was a legal adjournment of the Court, and the bankrupt was duly served with a notice of the day allowed for surrendering to finish his examination. This has not been proved and the case should not go to the jury.

Not Guilty.

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COURT OF CRIMINAL APPEAL.

(Before LEFROY, C.J., O'BRIEN, KEOGH and FITZGERALD
FITZGERALD and DEASY, BB.)

REG. v. WILLIAMS. (a)

Evidence.

Under the 24 & 25 Vict. c. 97, s. 51, evidence of damage committed several times, in the aggregate, but not at any one time exceeding 5l. will not sustain an indictment.

THIS case was reserved by Mr. Justice Christian from the last Spring Assizes at Derry. The prisoner was indicted under the 24 & 25 Vict. c. 97, s. 51. The indictment contained three counts, 1st for malicious damage to real and personal property, exceeding in value 5l. 2nd to personal property only 3rd, to real property only. The evidence showed that on the following days damage was committed exceeding in amount value 5l.

Irvine, for the prisoner, submitted that the indictment was not sustained, it not being proved that damage exceeding 5l. was committed at any one time, and cited *Rex v. Petrie* (1 Leach, 297); *R. v. Williams* (4 C. & P. 217).

Solicitor-General (with him *J. Richardson*).—This is but an indictment with different counts. There is only one single malicious purpose as shown by several malicious acts following one another: in the case in Leach, the acts were distinct.

LEFROY, C.J.—At first sight we had some doubts in this case but on consideration, we are all of opinion the conviction is

Conviction quasi

(a) From the *Irish Jurist*, by permission.

Ireland.

COURT OF CRIMINAL APPEAL.

(Before Eleven of the Judges, BALL, J., being absent.)

REG. v. MULLEN. (a)

Evidence—Deposition.

To ~~the~~ deposition of a marksman, the Petty Sessions clerk attached the prisoner's name, so that it appeared to have been signed by the prisoner's mark.

Held, that this deposition was properly received in evidence against the prisoner.

IN this case the prisoner had been tried at Sligo, for manslaughter, the question, now to be decided, arose under th 14 & 15 Vict. c. 93, s. 14, as to the admissibility of the deposition of the deceased. This deposition purported to have been made by the deceased in the presence of the prisoner, and was signed by him (the deceased) with a cross (+), he being a marksman. By mistake, the clerk wrote the prisoner's name to the mark, so that it *prima facie* appeared to be the deposition of the prisoner, accusing himself, and was in the following form:—

James Brennan,	} Petty Sessions District of Sligo.
Complainant.	
Peter Mullen,	} County of Sligo.
Defendant.	

DEPOSITION OF JAMES BRENNAN.

Taken in the presence and hearing of Peter Mullen, who stands charged, that he at Thomas-street, in the town of Sligo, on the night of the 30th of November, 1861, stabbed in the side the complainant. The deponent sayeth on his oath. That last night about eleven o'clock, at Scandans, as I was walking down the street to go over the bridge, I met Smith the cutler and that boy that I now see before me. Some of the two tripped me, I did not fall, immediately after I was tripped, this boy that I now see before me stuck me with a knife in the ribs on the left side, we had no words before he stuck me, he was drunk at the time—I don't know his name—I often saw him before he lived at Higgins.

(a) From the *Irish Jurist*, by permission.

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When I was stuck I ran down to the hotel. Smith the cutler did not do anything to me, but, to the best of my opinion, he struck me twice before I was stuck, but I cannot swear positively, I have no more to say.

And the said deponent binds himself to attend at the to prosecute the said Peter Mullen, for the said offence, when called on, or otherwise to forfeit to the Crown the sum of 10*l*.

(Signed,) PETER + MULLEN, *Informant*.
(his mark.)

Taken before me, this 1st day of December, in the year Eighteen hundred and sixty one, at Sligo in the said county.

(Signed,) WM. B. STARKIE,
Justice of Peace for said County.

I certify that the above is a true copy of the original.

WILLIAM CLANCY,
Clerk of Crown, Co. Sligo.

It will be seen the recognizance entered into, by the deceased complainant, to appear and prosecute, was inserted before the mark.

G. O. Malley, for the prisoner, contended that admitting a deposition would be good, in some cases, if signed by a mark, as oral testimony might then be admitted to prove who made the mark; but this goes further, and would require oral testimony to explain a patent ambiguity, as it purports to be signed by another. Several cases, on the execution of wills and contracts, under the Statute of Frauds, may be cited for the former proposition, such as *In Re Redding* (14 Jur. 1052); *In Re Glover* (11 Jur. 1028); *In Re Savoy* (5 Jur. 1042); *In Re Fleming* (2 Leach C. C. 854); *King v. Lambe* (2 Leach, 552); *Schneider v. Norris* (2 Maule & Selwin, 286); *Johnson v. Dodgson* (2 Mee & Welsby, 653); *Hubert v. Turner* (4 Scott, N. R. 486). But in the cases on wills, the statute required the signature to be by the direction of the testator, which direction, if proved, rendered the signature itself immaterial. But there is no case where the name signed, is the name of some other than the witness signing. [HAYES, J.—The mistake here appears to have been made by the person who wrote the name, and not by the deponent, his business was done when he put his mark.] There was the further point, that if it was a signature at all, it was a signature to the recognizance, and not to the deposition, which was a distinct document (in this case) wrongly joined to the recognizance, the latter being the only part intended to be signed by the deceased.

The Solicitor-General (Concannon with him) *contra*.—The document was complete when the deceased put his mark to it, it does not matter whether the clerk put the prisoner's name or what

ne. [CHRISTIAN, J.—The document purports to be signed by other. The question appears to me to be, can the Crown give evidence? That it was not that other person's signature.] at is the only question. [THE CHIEF JUSTICE.—All the mandatory provisions of the Act would appear to have been filled, but not the directory, this is only to be signed if he will.] at is so in the form given in the schedule. This document was signed by a mark, and that signature cannot be vitiated by what other person wrote: (*In Re Anne Ashmore*, 3 Curtis, 756; *Per v. Dening*, 8 Ad. & Ellis, 94.)

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Cur. adv. vult.

June 11.—LEFROY, C.J.—The question reserved in this case, whether the deposition was properly received at the trial. It appeared to the court to be a case of such importance, that it was reserved for the twelve Judges, and we are all of opinion that this position was properly received at the trial, we have come to this conclusion by different views on the several points, but not in such preponderance on any one point as to render it of importance to the public that we should give any further grounds of judgment. The conviction must therefore be affirmed.

Conviction affirmed.

Ireland.

COURT OF QUEEN'S BENCH.

RE WILLIAM JONES ARMSTRONG. (a)

November 12 and 16, 1861.

Mandamus—Quarter Sessions—Indictment for libel.

The Court refused to grant a writ of mandamus to justices at Quarter Sessions, commanding them to charge the grand jury with, and to try, an indictment for libel.

THIS was an application on behalf of William Jones Armstrong, Esq., justice of the peace and deputy lieutenant in and for the county of Armagh, for a writ of mandamus to be directed to Hans Henry Hamilton, Esq., Q.C., chairman of Her Majesty's Court of Quarter Sessions in and for the county of Armagh, and to the others the keepers of the Queen's peace, and Her Majesty's justices assigned in and throughout Her Majesty's said county of Armagh, to inquire by the oath of good and lawful men of said county of all and all manner of treasons, murders, felonies, trespasses and misdeeds, done or perpetrated in said county, and to hear and determine the matters aforesaid (treason excepted), commanding them at their next general Quarter Sessions of the peace in and for said county, to charge the good and lawful men who should be then impannelled and sworn as a grand jury, to inquire and make true presentment of certain false and malicious libels, written, composed, and published in said county of Armagh by the Rev. John Quinn, of and concerning said William Jones Armstrong as is alleged, and to charge said grand jury with, and to try before them, or permit and suffer to be laid before them, such bill of indictment as might be tendered to them, charging said John Quinn with composing, writing, and publishing said libels, and to inquire by them concerning the truth thereof, and the costs of the motion, writ, and mandamus, and the proceedings thereunder should be paid by said Hans Henry Hamilton, and William Moore Millar, William Paton, Andrew Craig, Jos

(a) From the *Irish Jurist* by permission.

ld, John G. Winder, John Hancock, and Hugh Boyle, esquires, said persons aforesaid being justices assigned as aforesaid, and being assembled at Armagh at a general Quarter sessions of peace for said county on the 19th day of October last, and a grand jury being then and there impannelled and sworn to inquire aforesaid, before said jury were discharged, were called on to charge said grand jury with, and lay before them a certain bill of indictment, charging the matters aforesaid, said bill being then and there tendered and shown to them for the purpose, and the justices resaid then and there refused to do so, and to inquire by said grand jury of the truth of the matters in and by said bill alleged, contrary to common right and the general law of the land. The facts upon which the motion was grounded appeared by the affidavit of Mr. Armstrong, and were as follows:—A letter was published in several newspapers in March last, charging Mr. Armstrong with oppressive conduct as a landlord towards some of his tenants. Thereupon Mr. Armstrong brought actions against the proprietors of the newspapers. These actions resulted in judgments by the proprietors, in the payment of sums of money by them to Mr. Armstrong, and in the delivery up to him of the manuscript of the letter in question. Mr. Armstrong then having reason to believe that the letter was written by the Rev. Mr. Quinn, obtained on the 7th October, a summons against that gentleman, requiring him to appear at Petty Sessions at Armagh, on the 11th of October, to answer Mr. Armstrong's complaint for composing and publishing said letter. The parties attended, and the matter having been gone into, counsel on behalf of Mr. Armstrong asked the magistrates to take the informations of certain parties who had been examined, and to bind the Rev. Mr. Quinn in his own recognizance to attend and take his trial at the ensuing Quarter Sessions at Armagh. This Mr. Armstrong in his affidavit stated was done, in order that, as the defendant proposed to prove the truth of the libel, a trial should be had without delay, and because Mr. Armstrong believed, as he further stated in his affidavit, that serious inconvenience would result to himself and to the public from a postponement to the Assizes. The magistrates, however, declared that they would return the case for trial to the Assizes, whereupon Mr. Armstrong's counsel said that he would withdraw the case, and prefer a bill of indictment before the magistrates at the ensuing Quarter Sessions at Armagh, and request them to lay it before the grand jury. Accordingly, at the next Quarter Sessions at Armagh, which was held by and before Messrs Henry Hamilton, Esq., Q.C., chairman of Quarter Sessions, and certain other justices (being the same whose names have been already given), counsel on behalf of Mr. Armstrong requested the said chairman and other justices to charge the grand jury with a bill of indictment, which he then tendered for the purpose to said justices, charging the said Rev. Peter Quinn with writing, composing, and publishing the libel complained of by the chairman, in the name and presence of the other justices.

Re
ARMSTRONG.
1861.
~~Mandamus—~~
Quarter
Sessions—
Libel.

RE
ARMSTRONG.

1861.

Mandamus—
Quarter
Sessions—
Libel.

refused to receive the bill and charge the grand jury therewith, and directed the acting clerk of the peace not to receive it. This occurred on the 19th of October last. Mr. Armstrong now asked for a mandamus as above stated, undertaking to prefer his bill of indictment at the next Quarter Sessions for the said county of Armagh. The notice of motion was served upon Mr. Hamilton and the other justices whose names have been already given, and against whom the costs of the motion were sought.

Armstrong, Serjt. (*M'Mechan* with him), in support of the application, urged that the justices had full power to entertain an indictment for libel, and that the words of their commission required them to do so. They cited *Rex v. Mullaney* (6 C. & P. 96); stat. 4 & 5 Will. 4, c. 76; Hawkins' P. C., book 2, c. 1, s. 6; stat. 5 & 6 Will. 4, c. 33; stat. 11 & 12 Vict. c. 42; *Rex v. Barker* (1 Wm. Bl. 352); sect. 38 of Common Law Procedure Act, 1856.

LEFROY, C.J.—We are all satisfied that there is so much novelty in this application that we feel bound to consider attentively whether we should make a precedent, and whether there is a foundation for making a precedent. No case has been cited either in England or in Ireland in which such an order has been made, and it therefore becomes us to consider very attentively before we make a precedent for the order. At present we say no more than that we wish to consider the case.

November 16.—The Court now delivered judgment,

LEFROY, C.J.—This is an application which came before the Court a few days ago for a conditional order for a mandamus to compel the Court of Quarter Sessions of the county of Armagh to receive and entertain a bill of indictment for a libel, and to proceed to try and determine the case. This is, at all events, as we intimated at the time, a rare and novel application, and notwithstanding the light which was thrown upon the case by the industry and learning of the counsel who moved it, we are not relieved from the consideration of its being novel and rare; for not a single instance was produced, although a very wide range of knowledge was taken of a similar case having come under the view of the court, or of a case having existed, where the jurisdiction which we were called upon to exercise was asserted. But it is not necessary in this case, nor are we about to state anything upon the abstract principle, because whether or not by possibility a case may not arise in which such an application might be entertained, it is perfectly clear that in this case it cannot be entertained, and I have only to state the facts of this case to demonstrate that. In this case, then, informations were taken for libel by the magistrates at Petty Sessions, and they, in their discretion, and in the exercise of the judgment which belongs to them, offered to return them to the Assizes, and then the party who claims no where withdrew, and he applied to the Quarter Sessions for that which he now

lies to this court. I may observe that the court of Quarter Sessions is not a court of appeal for this purpose from the court Petty Sessions. If, in the exercise of their judicial and magisterial discretion, they think it right to send informations before them to the Quarter Sessions, the Court of Quarter Sessions has right to refuse that exercise of the magisterial discretion of the Petty Sessions. But in this case the application was made directly to the Court of Quarter Sessions. The prosecutor applied to that court for leave to send up a bill to the grand jury. The court heard the application, considered the matter, and, in the exercise of their magisterial discretion, decided that they would not entertain the jurisdiction. If they had thought fit to receive the bill, they might in their discretion have sent it for trial at the Assizes. They, however, refused to entertain the case, and then the present application was made to this court. We come now to deal with the case as it has come before us, under very peculiar circumstances. It is a case in which the magistrates, having heard the application, in the exercise of their magisterial discretion declined to exercise the jurisdiction, which, it must be admitted, on the face of the authority under which they act, they possess, although, as I have already said, no instance has been known in which they exercised it, that, namely, of entertaining a bill for libel. They, therefore, refused to entertain the case, and the party to make the application which he has made to us. If we were now to grant this application to direct the Sessions to give this bill, and proceed to dispose of it and try it, we should be doing an illegal act, for we should be depriving them of a magisterial discretion which they are authorised to exercise—namely, that of sending cases of this sort to be tried at the Assizes. It would, therefore, be objectionable on that ground, to make the order, and it would be in vain to make it, as it must go to them, subject to the exercise of their discretion, if they should even receive this bill, they have already decided that in their judgment it is not a fit and proper case for them to proceed upon, and that it is a case which they think should be tried at the Assizes. We should be doing an illegal act if we attempted to restrain the exercise of their discretion, and we should be doing a nugatory act if we thought that in the exercise of their discretion, they would not proceed to try the bill. Under those circumstances we must refuse the applica-

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BRIEN, J.—I concur in the judgment of my Lord Chief Justice that the application is a novel one; but I was struck by the circumstance:—Great research has been displayed by the counsel who made the application in finding authorities on the subject; but the legal arguments which were deduced from those authorities would equally apply to cases as to which it would be possible for us to lay down that they ought to be tried at Quarter Sessions. The words of the commission given to the justices are very ample. They include not only cases of libel,

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but also cases of murder: and the legal argument addressed to upon those words would show that a mandamus should issue to compel the Quarter Sessions to receive as well a bill of indictment for murder as for libel. Then no precedent has been shown for our interfering with the Quarter Sessions in a case of this description. There are many cases in which a party would have no other remedy open to him, if the Quarter Sessions refused to entertain his application, and there are cases of that kind in which this court has interfered; but this is not a case of that kind. One of the principles on which this court grants the writ of mandamus is, that if it is not granted, the subject is without any remedy. But here the court of preliminary investigation intimated that the case was one which ought to go to the Assizes, and the party is, therefore, not in the position of being without any other remedy than that which he would have had at the Quarter Sessions. Then the Lord Chief Justice has alluded to the discretion which the magistrates at Quarter Sessions have of transmitting to the Assizes cases in which bills have been found before them. Writs of mandamus are not granted where they would be nugatory, or where to grant them would be interfering with the discretion of the court below. Suppose that the application had been simply for a mandamus to compel them to receive the case, what would be the object of a mandamus which would leave them to the discretion which they have already stated most strongly they would exercise in a particular way? My Lord Chief Justice has stated all the circumstances of the case, and I quite concur with him in all that he has said.

HAYES, J.—This is an application by Mr. William Jones Armstrong for a mandamus to the magistrates of the county of Armagh, assembled at Quarter Sessions, to command them to take cognizance of a charge of libel which Mr. Armstrong professes himself ready to make before that tribunal. This I take to be the substance, though not the exact words of the application; and as the application has at least the distinct feature of novelty, and as I have not been able to discover that such an application was ever before made, it may not be amiss to discuss it in somewhat of detail. On the 11th October in this year, Mr. Armstrong came before the magistrates at Petty Sessions, and there complained that he had been made the object of libellous attacks in newspapers, in the course of which he had been denounced as an exterminator of the people; he stated that he had discovered the author of these attacks; and prayed the magistrates to make that gentleman amenable, giving the magistrates to understand that until the prosecution should be brought to a close, he would not himself act in his position as a justice of the peace of the county. The magistrates professed themselves ready to receive depositions for the next Assizes. Mr. Armstrong said that no opportunity should be lost in bringing the matter to a determination, and therefore he insisted that the informations should be returned to the next Quarter Sessions. This the magistrates refused to do.

id he withdrew, and so the proceedings at Petty Sessions were brought to a close. Then he goes to the Quarter Sessions; he produces his bill of indictment, charging the Rev. Mr. Quinn with murder, and calls upon that court to permit him, without any preliminary examinations, to have the bill of indictment laid before the grand jury there, so that if the bill was found the case might be dismissed. The court came to the conclusion that his application ought to be refused, and then Mr. Armstrong comes here with the present motion. A good deal of argument was expended by counsel to show that the Court of Quarter Sessions had jurisdiction to try a case of libel. That they have legal authority to do so is a point which has not been contradicted for the last two centuries. It was decided in error in the case of *Rex v. Summers* (Lev. 139). That is still the law of Ireland, and there is no objection of that. But the difficulty which Mr. Armstrong had to cope with is to show that the Court of Quarter Sessions, having jurisdiction, was bound to exercise it. When a charge of an indictable offence is made before justices of the peace, and it appears that the case is one which ought to be prosecuted by indictment, the law has fixed in them a discretion as to the tribunal to which they are to send it, and this discretion they are to exercise according to the true spirit of their commission; for that instrument which, has been in the same form for the last two hundred and fifty years, after giving them power to inquire into a number of offences, "and to hear and determine all and singular the matters aforesaid (treason excepted), according to the laws and statutes of our kingdom of Ireland, as in the like case has been used, and ought to be done," proceeds, by way of proviso, to command them, "that if a case of difficulty upon the determination of any of the premises shall happen to arise before you, or by two or more of you, then do not you, or any two or more of you, proceed to give judgment thereon, except it be in the presence of one of our justices of one or other bench, or one of the clerks of our Exchequer, or one of our counsel learned in the law." The practical interpretation of this is, that all the less serious offences are sent to the Quarter Sessions, but that the more serious offences are sent to the Assizes: and notwithstanding that the stat 1 & 2 Ph. & Mar. c. 13 (England), and 1 Car. 1, sess. 2, c. 18 (Irish), have directed the justices, in cases of felony, to certify the examination taken by them to the next general gaol delivery, yet in the exercise of a sound discretion the committing magistrate has been in the habit of sending the offenders, in cases of petty larcenies and small felonies, for trial to the Quarter Sessions, and of certifying the examinations thereto. Dalton, in his work on Justices of the Peace, lays that down as the practice in his time, and cites the Act of 3 Hen. 7, c. 3, as authority. That Act was in force in Ireland until the passing of the statute 9 Geo. 4, c. 54, and the doctrine as stated by Dalton is that that Act orders the magistrates to bind the witnesses to appear at the next court at which the trial of the affair

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is to be had. I am of opinion that the magistrates had a discretion to send the case before them either to the Quarter Sessions or the Assizes, and taking all the circumstances into consideration am of opinion that the magistrates exercised their discretion soundly in not yielding to the prosecutor, and insisting that the case should go to the Assizes. But not satisfied with this determination of the Justices in Petty Sessions, Mr. Armstrong brought the matter before the Quarter Sessions, and he insisted that that court was bound to take cognizance of the case by sending it to the grand jury, and his counsel insisted that if a bill were found, the case should then go before a petty jury. Now, I am of opinion that I apprehend that in insisting that for the asking the Court Quarter Sessions was bound to accede to his request, he is wrong. The words of the commission, providing for cases of difficulty, apply as much to the justices at Quarter Sessions as to magistrates at the Petty Sessions; and this may have occurred to the magistrates that if they permitted a bill to be found, and a trial to be had without informations herein sworn, such a practice would infringe very seriously on the rights which every accused person has since the passing of the Prisoner's Counsel Act. His Lordship then referred to *King v. Wetherell* (R. & R. 381), and continued:—I am of opinion then not only that the magistrates at Quarter Sessions, like those at Petty Sessions, were at liberty but that it was their duty to exercise their discretion, and I think the discretion was soundly and wisely exercised in the present case. Is it not then against the first principles of mandamus to accede to this application? Generally speaking the writ is granted to enforce a right or duty, when the party has no other remedy. But here the party has another remedy, and the magistrates are willing to give him the benefit of that remedy. Again, why should we grant the writ, when our doing so, though the indictment were found, could not prevent the magistrates from sending the case, as one of difficulty, to the Assizes? We are not a Court of Appeal from the Quarter Sessions; we are only an authority to make them do their duty. We are not prepared to say that they have not acted rightly in this case, and we do not think that we ought to grant even a conditional order.

FITZGERALD, J.—My Lord Chief Justice and my brother have so exhausted the subject that I do not profess to add anything to what they have said, especially after the very full exposition of the law by my brother Hayes. But there is one point upon which I may be permitted to say a few words. As I understand the application it was one which Mr. Armstrong claimed to have granted as a right, alleging as a matter of right that it was his client's right to present the bill of indictment at the Quarter Sessions, and that that court was bound to receive it, and that the grand jury had found it they were deprived of any discretion and they must go on and hear the case. That was the application and that involves two principles, namely, that it was a matter of right in the prosecutor to have his bill received at the Quarter

Sessions, and that on the bill being found the court was deprived of any discretion to refuse to try the case. I recollect asking whether in fact a more speedy trial could not take place at the Assizes, even if the order sought for was made, and the answer was that the Quarter Sessions would be bound to issue a bench warrant to bring in the defendant, and then to put him on his trial. The opinion which I have arrived at is, that the Court of Quarter Sessions had a discretion as to the reception of this indictment, and if that court was not vested with a judicial discretion, I cannot understand why the application was made to them at all, and why the prosecutor was not entitled to go straight to the grand jury room, and call on the grand jury to receive the indictment without going to the court at all. Assuming the discretion to exist, I think it was wisely exercised. We are not to come to the conclusion that it was unwisely exercised, and again I agree in the proposition that if the court below had entertained the bill by sending it before the grand jury, and the grand jury had found it, still there was a discretion in the court to decline to have the case tried at sessions by a petty jury, and to transmit it to the Assizes, and have it more solemnly decided there, and that upon the ground that it was a case of difficulty. It has been urged that because the chairman of the court was a Queen's Counsel, the discretion of the court was taken away. That argument comes to this absurdity, that if the chairman happened to be a stuff gown, the court over which he presided had a discretion; but, that if he happened to be a silk gown, or was made a silk gown pending the discussion of the application, the discretion was removed. Let us now see if this was a case of difficulty. During the course of the argument I asked why this gentleman was so anxious to have his case tried at the sessions, for it struck me that a person would wish to have a case like this tried in a grave and solemn manner. The answer I received was, that by this indictment the anxiety of the prosecutor was to clear his character, and to have an opportunity to try the truth of the matters alleged in the libel, which, he told us, the reverend defendant stated he was prepared to prove. Upon this arises the question, whether, having reference to the maxim which says that the greater the truth the greater is the libel, you can on an ordinary indictment for libel try the truth of the matters contained in the libel. If the real object of this gentleman had been to try the truth of these matters and clear his character, there were two courses open to him. He might have come to this court and applied for a criminal information, and one of the advantages of that course is, that by adopting it the prosecutor has the earliest possible opportunity of coming here and, by his affidavit, telling the truth and the whole truth, of showing that there was no ground for the accusation made against him in the libel. Again, he had the course open to him of bringing an action for libel, and in that action the question of the truth or falsehood of the libel

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might be put in issue. But when you come to discuss the question of truth on an indictment for libel, the defendant is bound to show not merely that the libel was true, but also that it was for the public advantage that the truth should be known. Let us see what are the provisions of the statute 6 & 7 Vict. c. 93 under which alone the truth of a libel can be investigated in a proceeding of this kind. They are contained in the sixth section of that Act, which enacts that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as thereafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence unless it was for the public benefit that the matters charged should be public; and that to entitle the defendant to give evidence of the truth of the matters charged as a defence to such indictment or information, it shall be necessary for the defendant in pleading to the indictment or information to allege the truth of the matters charged in the manner required in pleading justification to an action for defamation, and further to allege that it was for the public benefit that the matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that those matters should be published to which plea the prosecutor is to be at liberty to reply, generally denying the whole thereof. That is not all. If after the plea the defendant shall be convicted on such indictment or information, he shall be competent to the court in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it. Let us now suppose that the object of having this case tried at the sessions was to have the truth or falsity of the libel investigated at the earliest opportunity. Can any one hearing the provisions of that statute read, under which alone the truth of the libel can be investigated, fail to see that this presented a case of difficulty which was not fit to be tried at Quarter Sessions? Why, you have a course of pleading marked out by the statute of the nicest and most difficult description; and it is said that the Court of Quarter Sessions is to put in motion this complicated system of practice, first to make the defendant amenable by a bench warrant, then it was to rule him to plead, and finally, if there was a conviction, to determine whether the defendant's guilt was aggravated or mitigated by the plea and the evidence. All this is to be done, and with all this to be done it is said that the case involving it all is one fit to be tried at Quarter Sessions. It is plain that the desire to have the truth speedily investigated is not the true motive in this case. What the motive was it is not for us to consider. We cannot say that the discretion of the justices was unsoundly exercised, but we can say that if they had entertained the case it is one which would perhaps have been removed from their jurisdiction by certiorari. In conclusion, I have only to say that I concur in the judgment of my brother

Hayes, and that it would be a perfect delusion to send the case to the Quarter Sessions with a view of having a speedy decision on it, as no trial could take place there, at least until the April Sessions.

Rule refused.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

June 24, 1863.

(Present:—The Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L.J., TURNER, L.J. and Sir E. RYAN.)

FALKLAND ISLANDS COMPANY v. THE QUEEN. (a)

Appeal in criminal cases—Colonial courts—Circumstances in which leave to appeal granted.

Though in strictness the Crown has authority by virtue of the prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless the Crown has parted with such authority, yet the inconvenience of entertaining an appeal in criminal cases is so great that it will not be allowed except in very peculiar circumstances. Thus, where a colonial police court, from which no appeal lay to the civil court, had decided a criminal matter, which in substance was of a civil nature, and affected the rights of property generally in a colony, and could not easily be put in the form of a civil action, leave to appeal was allowed.

THIS was an application for leave to appeal from a judgment of a police court in the Falkland Islands, which was opposed on the ground that it was a judgment in a criminal cause, and not appealable.

LORD KINGSDOWN.—Their Lordships, at the hearing of this petition, entertained a strong opinion that the point which had been decided by the Court below in convicting the petitioners of the offence alleged against them was one of sufficient difficulty and importance to make it desirable that it should be submitted to further consideration before a higher tribunal. But they were desirous of looking into the authorities on the subject, and of considering how far the principles which have been laid down in former cases with respect to appeals in

(a) Reported by JAMES PATERSON, Esq., Barrister-at-Law.

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criminal proceedings leave them at liberty to reach the merit of the particular case without infringing those rules which it is of the greatest importance to the public interests strictly to maintain. It may be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this board similar to the present have been attended with success. The whole subject was most fully investigated in the recent petition of Joykissen Mookerjee, who had been convicted of forgery by one of the courts in India. The Judicial Committee, by Dr. Lushington, expressed their opinion that there had been miscarriage of justice in the case, and that supposing it to have been a civil and not a criminal case, they would have had no hesitation whatever in recommending to Her Majesty to allow an appeal for the purpose of considering the proceedings complained of, and doing justice to the party complaining, and yet they refused to interfere. Dr. Lushington observed that, by granting an appeal in that case was meant an examination of the whole of the proceedings, including the evidence, and that in no instance whatever of any grievance, however great, has any such appeal been ever entertained, and that the consequence of entertaining it would be entirely destructive of the administration of all criminal jurisprudence, and that if injustice had been done the proper mode of remedying it was by application to the Crown in another shape, and by way of appeal. To these principles their Lordships entirely assent, and it is only on the ground of the great peculiarity of the circumstances of this case that their lordships are disposed to advise Her Majesty to admit, under certain restrictions, an appeal against the order complained of. The main ground is this, that the proceedings, although in form of a criminal, are in substance rather of a civil nature, deciding a question of property, a question of great general importance, involving the rights both of the Crown and its grantees throughout these islands, and affecting most materially the value of all the lands in hands of the holders on the one hand, and the claim of the Crown to the property in the wild cattle on the other. It is obvious that this is a question of too great importance to make it fit that it should be finally concluded by a summary conviction in a police court. If the effect of their Lordships' determination in this petition were confined to the particular cases already decided, and to the retainer by the Crown, or its refunding to the parties, the amount of the penalties which it has received and not already remitted; or if the question decided by the conviction could be brought for trial in a civil action, and thus be carried regularly by appeal to Her

Majesty, their Lordships are so impressed with the danger of
 appearing to relax the rules against entertaining appeals in
 criminal cases, that they would not advise Her Majesty to grant
 any relief upon the present petition. But it seems by no means
 clear that this question can be raised in a civil court as regards
 what has already taken place, or that similar difficulties may not
 prevent the question from being tried in a civil court in cases of
 the same kind which are likely to recur, and their Lordships think
 that it is of equal importance to the Crown and to the colonists
 that a point so grave, with respect to which they do not of course
 intimate, and indeed have not formed, any opinion either one way
 or the other, should be the subject of decision in this country.
 Another circumstance by which their Lordships are much
 influenced is the analogy to the proceedings which would in
 similar circumstances have been competent to the defendant if the
 conviction had taken place in England. The conviction might
 have been brought before the Court of Queen's Bench by writ of
 certiorari, and the justice of the decision subjected to review on
 the matters appearing on the record. But in this case, as far as
 appears, no means of review of any sort existed in the colony; for
 though the ordinance referred to gives an appeal to the police
 court from a conviction by a single magistrate, the conviction here
 has been pronounced by the Court itself. For the reasons assigned
 their Lordships will advise Her Majesty to receive the petitioner's
 appeal for the purpose of raising and determining the important
 question of law which arises in it; but the appeal must be con-
 fined to that point alone, and no objection of a merely technical
 character must be considered as open. Their Lordships understand
 that the real question to be determined appears upon the face of
 the record of the proceedings, the whole of which will be brought
 up. The costs of the petition must be reserved. The usual
 security for the costs of the respondent will be given to the amount
 of 300*l*.

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Leave to appeal granted.

COURT OF QUEEN'S BENCH.

May 2, 1863.

(Before CROMPTON, BLACKBURN, and MELLOR, JJ.)

WILSON (Appellant) v. STEWART (Respondent). (a)

Aider and abettor—Master and servant—Harbouring prostitutes—
 11 & 12 Vict. c. 43, s. 5; 2 & 3 Vict. c. 47, s. 44.

A servant at a house of public resort who, in the absence of his master—
but carrying out his orders, harbours prostitutes in the house, may be
convicted under the 11 & 12 Vict. c. 43, s. 5, of aiding and abetting—
in the commission of the offence of suffering prostitutes to meet together—
and remain therein contrary to the 2 & 3 Vict. c. 47, s. 44.

CASE stated under the 20 & 21 Vict. c. 43 by A. A. KNOX
 Esq., one of the Metropolitan Police Magistrates.

On Saturday, the 14th day of February, 1863, Charles Stewart appeared upon a summons to answer the complaint of John Wilson, charging him, for that he on the 17th January, 1863, at No. 48, Leicester-square, in the parish of St. Anne's, Westminster, in the county of Middlesex, and within the district of the Court, did unlawfully aid and abet one John Fryer, he being then and there the keeper of a place of public resort wherein refreshments are sold and consumed, in knowingly suffering prostitutes to meet together and remain in the said place of public resort.

The evidence was conclusive and undisputed as to the presence of numerous prostitutes at the house named on the morning in question, as to the continuous presence at the house on the said morning, and as to the consumption of refreshments at the same time and place. It was sworn by the inspector of police, who gave evidence in the case, that John Fryer was the keeper of the said house, and this was undisputed.

Charles Stewart was head waiter or manager for the said John Fryer on the morning in question at the said house, and his attention was specially called by the police to the number of the said prostitutes on the said premises.

John Fryer was not present at the said time and place. There

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

are now and at the time named warrants for John Fryer's apprehension in force from this Court for non-appearance to summonses to answer charges for suffering prostitutes to assemble at his said house contrary to the 2 & 3 Vict. c. 47, s. 44.

The magistrate was of opinion upon the above evidence that the relation of servant and master was proved to exist between Charles Stewart and John Fryer, but that such relation was insufficient to establish in point of law an aiding and abetting according to the true meaning and intent of the 11 & 12 Vict. c. 43, s. 5, and he refused to convict.

The question of law arising in the above statement for the opinion of the Court is whether Charles Stewart was an aider and abettor of John Fryer, the keeper of a place of public resort wherein refreshments are sold and consumed, in knowingly suffering prostitutes to meet together and remain therein.

D. D. Keane, for the appellant.—There was ample evidence to show that the respondent who was managing the house in his master's absence was an aider and abettor of the master within the 11 & 12 Vict. c. 43, s. 45, in knowingly suffering prostitutes to meet together and remain in the house contrary to the 2 & 3 Vict. c. 47, s. 44.

CROMPTON, J.—It is not found that Fryer had a guilty knowledge, or that Stewart was carrying out his orders.

Keane.—It is found that Stewart was manager for Fryer on the morning in question, and no doubt the opinion of the Court was desired as to whether or not a servant acting in the management of the house is liable under the statute.

No counsel appeared for the respondent.

CROMPTON, J.—We cannot interfere to find a fact which has not been found by the magistrate, and therefore, we must dismiss the appeal, but without costs. But, if it is desirable for future guidance that we should express our opinion, we can only say that there is no doubt that a man may be an aider and abettor, though he is only in the capacity of a servant; for if, as in this case, the master goes away and the servant manages the house in his absence, that would do to make him liable. The magistrate, however, does not ask that, but merely whether or not, being a servant, he is liable?

BLACKBURN, J.—I am of the same opinion. There is some ambiguity in the statement of the case. If the magistrate meant to ask whether the relation of master and servant was sufficient to make Stewart an aider and abettor, I should answer certainly not. If on the other hand he meant to ask whether that relation would prevent him from being an aider and abettor, I should also say certainly not. If the servant is employed *quoad hoc* for the very purpose of committing the offence, that would sustain a conviction.

MELLOB, J. concurred.

Appeal dismissed without costs.

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June 23, 1863.

(Before WIGHTMAN, CROMPTON, and BLACKBURN, JJ.)

REG. v. STIMPSON.

REG. v. PEAK. (a)

Claim of right—Nature of claim—Information for unlawfully taking fish in a river—24 & 25 Vict. c. 96, s. 24.

When upon the hearing by justices of an information, a claim of right is set up by the defendant, such claim, if made bonâ fide and with some show of reason, will oust their jurisdiction; and although it is for the justices to determine whether or not such claim of right is made bonâ fide and with a show of reason, yet, if they determine that it is not so made, this Court will review their determination and overrule it if come to upon insufficient grounds.

RULES nisi to quash two convictions against the above defendants for attempting to take and destroy fish in the river Waveney in which the prosecutor had a private right of fishery contrary to sect. 24 of the 24 & 25 Vict. c. 96.

Although the informations and convictions in these two cases were separate, the evidence and proceedings in each were the same substantially.

J. Kerrich, the prosecutor, was Lord of the ancient manor of Stockton-with-the-Soke, in Norfolk, which he purchased in 1824 from persons to whom it had been sold by the Commissioners of Woods and Forests. He had previously paid rent for the right of fishing, and the Crown had from time to time granted leases of the right of fishing. The prosecutor after the purchase posted notices prohibiting people from netting in the river, and about the year 1840 he took away the net of two men which they were using for catching smelts. Upon expressing their regret the prosecutor gave back the net and allowed them to use it; for the future taking from them the first score of smelts caught in each season as an acknowledgment of the licence so given to them. He also gave leave to other persons to use nets for the purpose of catching smelts.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

It was elicited from the prosecutor's watcher that he had netted the river from his boyhood without the prosecutor's permission, and that his father had constantly done so. The river is a tidal stream, and the tide ebbs and flows at the part where the defendant was using the net. The defendant and other persons had for many years been in the habit of fishing with nets over the water in question, and no one had ever been summoned or prosecuted for doing so before the present proceedings were taken.

Before the justices the defendant pleaded not guilty, and asserted a claim of right to fish with nets in the said river, and his attorney contended that there was no proof that the prosecutor had a private or exclusive right of fishing; that the question whether he had such a right was one which ought to be tried by action, and that the justices ought not to proceed any further, citing *Reg. v. Cridland* (7 E. & B. 863); and also arguing that according to *Carter v. Murcot* (4 Burr, 2163) the right of fishing was common to the public, inasmuch as the Waveney was a tidal river.

Witnesses were called for the defence, who swore that they had fished the water with nets for more than forty years. The justices nevertheless being of opinion that the prosecutor had an exclusive right of fishing, and that the defendant was conscious at he was doing wrong, and did not believe that he had any right, convicted the defendant.

Bulwer showed cause and contended that, to oust the jurisdiction of the justices the claim of right must be a reasonable one, and be made *bonâ fide*, and that of this the magistrates are the judges, and that this Court will not interfere with their decision upon that point: (*Cornwell v. Sanders*, 32 L. J. 36, M. C.; 7 L. T. Rep., N.S., 356; *Leat v. Vine*, 30 L. J. 207, M. C.) [WIGHTMAN, J.—The question is, was there a *bonâ fide* claim of right? The justices certainly say there was not.] That was for the justices to determine. [CROMPTON, J.—Not quite so; the case must be such as to warrant that opinion. The real question is, was there evidence fairly before them that the claim set up by the defendant was a reasonable one? If it is merely an idle claim, as where the defendant says, "You can have no right, because this is a tidal river," that would be illusory; because, although it is a tidal river, the prosecutor may have a private right of fishery. But here there seems to be a *bonâ fide* assertion, accompanied by reasonable evidence.] If parties can oust the jurisdiction of the justices by a mere claim of right, an owner may never be able to enforce his rights. [WIGHTMAN, J.—He may enforce his right by action, and then it can no longer be questioned.]

H. Lloyd, for the defendants, was not called upon.

WIGHTMAN, J.—The question is, whether or not the justices had jurisdiction to determine the information, notwithstanding the defendants set up a claim of right? It appears that upon the hearing the defendants disputed the jurisdiction, partly by denying the prosecutor's right of fishery, and partly by setting up a right in

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themselves. Now it is clear that if they set up a *bonâ fide* claim of right, then the jurisdiction of the justices was ousted. There must, no doubt, be some show of reason in the claim, as was said by the Lord Chief Justice in *Cornwell v. Sanders*, and it must be something more than a bare assertion. In the present case the right set up by the prosecutor is against the common law right, although undoubtedly it may be maintained, and in many of the cases in which the claim of the defendants has been disallowed, it has appeared that the claim has been in opposition to such common right, as in the case of a man claiming a common right for all persons to sport over another man's land. Here the claim is to fish in a tidal navigable river, and for which there is some evidence of user for a great many years. Now the justices have said that this was not a *bonâ fide* claim; but, as far as it is possible for a claim to be *bonâ fide*, this appears to be such; and indeed, if it be not, I do not see what sort of claim may not be treated as not being a *bonâ fide* one. Whether or not it can be ultimately maintained is altogether another matter. The convictions therefore must be quashed.

CROMPTON, J.—I also think that the convictions ought to be quashed. Mr. Bulwer has not been able to question the rule laid down in Paley's Law and Practice of Summary Convictions (3rd ed. p. 28), which I referred to in *Reg. v. Cridland*, at which place it is said, "Where property or title is in question the jurisdiction of justices of the peace to hear and determine in a summary manner is ousted, and their hands tied from interfering, though the facts be such as they have otherwise authority to take cognizance of." There are many cases where the justices may fairly say that a claim of title is not *bonâ fide* set up, and then it is for the Court to say whether there was reasonable evidence upon which they should have come to such a conclusion. In *Reg. v. Cridland* we held that there was no such reasonable evidence, and here we have to see whether the evidence was such that the justices ought to have said that the claim of right was not *bonâ fide*. In the first instance they had to be satisfied that a private right of fishing was established; but when the defendant sets up that he himself had a right, the justices had to determine the question of *bona fides*. Now, *primâ facie*, the public have a right to fish in this tidal river, and the defendant asserted that title, and alleged that admitting that the prosecutor made out a strong *prima facie* title on paper, he could show a contrary right, and object to the justices deciding the question. It seems to me that under the circumstances there was nothing which could lead the justices to say that there was no *bonâ fide* claim of right, and therefore that the convictions were wrong.

BLACKBURN, J.—I am of the same opinion. The rule of law is that the justices are not to convict where a real question is raised between the parties as to the right. As soon as that is done the jurisdiction of the justices ceases, and the question ought to be left to be decided by a higher tribunal. In *Reg. v. Cridland*

Patience Swinfen prosecuted a gamekeeper and four others for shooting over the Swinfen estates, and the justices convicted them. This Court intimated a strong opinion that under the circumstances the justices had no jurisdiction to convict. Here the defendant was fishing in a navigable river, in which the tide flowed and reflowed, and in which there was consequently *primâ facie* a common right of fishing for the public. It was said by Mr. Bulwer that it was not navigable in old times, but whether it was so or not, it is quite consistent with the right claimed by the defendant. The presumption is against the prosecutor, and there was a great weakness in the title which was set up by him, inasmuch as he failed to show any exclusive possession of the water. At any rate a plausible question of title was raised, for the defendant showed by witnesses that they had fished the river for forty years without interruption. It would be a very strong thing to say that the defendant could not honestly think that he had a right, which, *primâ facie*, he had by law. There was reasonable evidence on which the justices might have deemed that a claim of right was *bonâ fide* set up by the defendant.

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Convictions quashed.

COURT OF QUEEN'S BENCH.

June 27, 1863.

(Before WIGHTMAN and BLACKBURN, JJ.)

O'NEILL AND GALBRAITH (Appellants) v. LONGMAN
(Respondent). (a)*Trade unions—Threats—Attempting to force journeymen to leave their
employ—6 Geo. 4, c. 129, s. 3.*

L., a member of a trade society, was told by members to leave off working for K., his master, he refused; O'Neill, the president of the society said that he, as president, ordered him to come out, and then abused L., and said, if he had been working at K.'s he would have pulled him out, and that he would use his influence to have him turned out of the society. Galbraith and others went to K.'s as a deputation, to point out to K. what they objected to. After this, L. was summoned by the society, O'Neill being in the chair, and the business was, whether L. was going to leave K.'s or be turned out of the society. Galbraith reported to the meeting the result of the deputation to K.'s. L. was then asked by O'Neill whether he would leave K.'s, or stay there and be despised by the society, and have his name sent round all over the country in the report, and be put to all sorts of unpleasantness: Held, that this was evidence of a threat by O'Neill under 6 Geo. 4, c. 129, s. 3, and an endeavour to force L. to depart from his employment.

CASE stated under 20 & 21 Vict. c. 43, for the opinion of the Court, upon a conviction of two persons named O'Neill and Galbraith upon an information under the 6 Geo. 4, c. 129, s. 3, charging that they "unlawfully, by threats and intimidation, did endeavour to force William Longman, who was hired as a boiler maker by H. R. Kruger and his partners, to depart from his said hiring, contrary to the said statute."

CASE.

Messrs. Kruger, Dannatt, and Co., who are boiler makers at Hull, some time ago contracted with the Manchester and Lincoln-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

ire Railway Company to make two boilers. Having on a former occasion employed a man named Garvin to execute a similar contract, Messrs. Kruger applied to him again as to making the two boilers. The negotiations however failed, and they declined to accede to Garvin's terms as to the time and mode of payment for the work.

Garvin is a member of the United Boiler Makers and Iron Shipbuilders Society, a society or club not registered, but having branches in every place of importance in England, Scotland, Ireland, and Wales, the executive committee of the society being stationed at Manchester. The executive at Manchester, deriving information at the local boards, issue a printed circular periodically on various matters connected with the society, and if a member is expelled his name is inserted in such report of the executive committee.

The appellants, O'Neill and Galbraith, are members of the society, O'Neill being president of the Hull branch, and Mr. Roberts being the local secretary.

The negotiations with Garvin having gone off, Messrs. Kruger's foreman of boiler makers (Longman) communicated, on the 6th March, with the secretary of the Hull branch of the Boiler Makers' Society, with a view of obtaining men to perform the work. It would seem, the boiler makers belonging to the society have divided themselves into three classes of workmen, "holders," "rivetters," and "platers," the latter being the highest class, and comprising those who are supposed to be skilled in bending angle iron for the boilers; though it is proved that, in many very large establishments, angle iron bending is performed by the blacksmiths, and not by those calling themselves exclusively boiler makers, the boiler makers in reality having sprung from the blacksmiths, and following one branch only of the blacksmiths' business. Longman is a member of the society, or what is called club man, and there were at that time three other members of the society, Jordan, Bell, and Longthorne, in the employ of Messrs. Kruger.

On the 12th of March, all attempts to obtain men from the club having been unsuccessful, Messrs. Kruger ordered their foreman blacksmith (Norfolk), who is not a club man, to commence work on the boilers by bending angle iron, Norfolk having on former occasions performed similar work, and being fully competent as an angle iron smith, though not ordinarily employed in such a way. Norfolk continued his work of bending angle iron from the 12th, without intermission.

On the afternoon of the 12th Longman was summoned to attend a meeting of the society, the object of the meeting, as stated in the summons, being "to stop an encroachment." Longman attended the meeting, and found the encroachment to be "Norfolk's working at angle iron." O'Neill was in the chair, and a resolution was passed that the men belonging to the society should not be allowed to work at Messrs. Kruger's, if Norfolk was allowed to work at

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angle iron work. A resolution was then proposed by Longman and carried, that two deputies should be sent to Mr. West, Messrs Kruger's foreman, to speak to him in reference to knocking off Norfolk. One deputy was to be a rivetter (Fairfield), the other an angle iron worker (Beaumont). O'Neill then told Longman, Jordan and Bell, all being present, that being club men working in Kruger's yard, they would have to come out if Norfolk was not knocked off angle iron work. Beaumont and Fairfield went from the club to the house of Kruger's foreman, Mr. West. Beaumont offered his services as an angle iron smith, stating he was a club man, and had come from the club and was going to return there again. He was told that Norfolk had been set to work, but was promised a job if he came next day.

On the 13th, Beaumont went to Kruger's and had some conversation with Longman and the other club men in Kruger's employ. He was told by West to begin angle iron turning, and replied that he understood the club to say that he was not to work unless Norfolk gave over working at the angle iron work. He then went away without working. After dinner, on the 13th, Jordan, Bell, and Longthorne did not return to work, but Longman continued to work as usual. On the 14th, Beaumont came to work for a few hours, and bent one bar of angle iron but the work was so badly done that it could not be used, and Jordan, Bell, and Longthorne also came to work on the 14th as usual.

On the evening of the 14th there was another club meeting and after the 14th neither Beaumont, nor Jordan, Bell, or Longthorne ever came to work again; Longman, however, continued to work as usual.

The 16th of March was the anniversary of the society, and there was a dinner at 7 p.m. Longman and Longthorne went in the evening and called O'Neill out from the dinner, and Longthorne asked him, as president of the Hull branch of the society why they should leave Kruger's work. O'Neill replied: "I John O'Neill, as president of the society, order you (meaning Longman and Longthorne), to come out;" and he called Longman "a damned thief," and other abusive names, and said that "if he (O'Neill), had been one of the men working at Kruger's premises, previous to this occurrence, he (O'Neill), should certainly have pulled Longman out." O'Neill also said that "he would use his influence to have Longman turned out of the society."

Longman, however, did not leave his work at Kruger's.

On the 17th Galbraith and others came to Kruger's works as a deputation from the club, as to the difficulty that had arisen as to the club men working if Norfolk was allowed to continue his work at angle iron bending. Mr. Kruger told the men at this interview that forbearance would not last for ever, and Norfolk was continued at his work. After this Longman received a summons to attend a meeting of the club on the 28th, "on

important business." Longman attended the meeting, at which there were fifty members present, and among the rest Galbraith, O'Neill being in the chair. Longman found that the important business was, whether Longman was going to stop in the society and leave Kruger's employ, or remain at Kruger's and be turned out of the society. Galbraith made a report of the proceedings of the deputation to Kruger on the 17th, and the report was put to the meeting, received, and adopted. Longman was afterwards asked by O'Neill, from the Chair, whether he intended to remain an honourable member and leave the shop (meaning Kruger's), or stay in the shop (meaning Kruger's employ), and be despised by the club and have his name sent round all over the country in the report, and be put to all sorts of unpleasantness. Longman told O'Neill that if there was anything to undergo, he would bear the consequences, but several of the members having come round Longman, a resolution was passed, giving him till Monday, the 30th, for consideration, and Longman said he would duly consider it. The result of which was, he wrote to the secretary a letter declining to leave his employment.

It was stated at this meeting that they could not legally turn Longman out of the society then, but would have to write to Manchester, and a resolution was passed that Norfolk's case and the master's case should be determined according to the rule, and Longman's case also, the rule being that club men shall not use their influence to obtain work for non-society's men. Longman asked O'Neill what the rule was, and O'Neill replied they should refer to Manchester. Longman, at the time I heard the case, could not say whether he had been turned out of the club or not, but had received no notice to that effect.

It was contended in defence by the attorney for the appellants, that in what has occurred there has been no breach of the law; that O'Neill, Galbraith, and other members of the club have merely told Longman that they would carry out the rules of the club, and that the decision of the case would be determined at Manchester; that there was no immediate threat or intimidation; that Longman admitted he had made no complaint himself that the rules had been departed from, and that Longman was not aware that there had been any departure from the rules; and lastly, that O'Neill and his companions had been actuated by a *bonâ fide* belief that it was for the interests of society at large that they should carry out the leading principles of the club, that each class of workmen ought to go through a regular course of instruction in its particular branch, that the various stringent rules of the club for the separation of the workmen into different classes, and for the keeping up of such separation, were beneficial, and that the club should not allow club men to work with any but skilled workmen who have satisfied the requirements of the club.

I found each of the defendants guilty, being of opinion, after carefully perusing the rules of the club, that they did not contain anything that would afford any sanction for what had been done

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by the appellants, or offer any explanation of their conduct consistent with their innocence. It appeared to me, therefore, that the defence, so far as it rests upon the conduct of O'Neill and Galbraith, being a mere carrying out legally of the rules of the society, in which Longman was bound to acquiesce, wholly failed; and the only other question was, whether the evidence in this case satisfactorily showed that there had been such an endeavour to force a man to depart from his hiring by threats and intimidation as constituted the offence contemplated by the Act of Parliament under which the information was laid. I have expressed an opinion that what took place on the 28th of March, looking also at the spirit previously evinced, did constitute such an offence. O'Neill, as the mouthpiece of the meeting, sanctioned in what he said by Galbraith and each of the fifty members present, put the alternative to Longman whether he would remain an honourable member and leave his employ, or remain in his employ, be despised by the club, have his name handed round all over the country in the report, and be put to all sorts of unpleasantness. I expressed an opinion that this was endeavouring to coerce Longman to depart from his hiring by threats and intimidation within the meaning of the Act of Parliament. It appeared to me that to a man differently constituted the alternative of being despised and being put to all sorts of unpleasantness, coming as it did from fifty of his fellow club men, and that his name would be handed all over the country in the report (independently of the loss on being turned out of the club of all club benefits), might have easily resulted in making Longman feel that if he did not comply with the wishes or orders of the club he would be a marked man for life, and that he must of necessity leave his employment, although as it happened the deliberation given the matter by Longman induced him to remain faithful to his employers. It is proved by the evidence that the leaving work by the three other club men was very inconvenient, and calculated to injure Messrs. Kruger, and had Longman, who was the foreman boiler maker, followed the example of the rest, the injury and inconvenience to Messrs. Kruger would have been much greater. I was of opinion that there was a combination not for the purpose *bonâ fide* of carrying out the rules of the club, but with the object of coercing Longman to depart from his hiring against the wish and also to the injury both of himself and Messrs. Kruger, and with the intention thereby of coercing Messrs. Kruger to comply with the wishes of the club as to Norfolk. In coming to this conclusion I have found that Norfolk was a perfectly skilled workman as an angle iron smith, and I have taken into consideration the circumstances that occurred both before, on, and after the 28th, in coming to a decision as to the motives which animated O'Neill, Galbraith, and the rest of the club.

I therefore now respectfully have to ask the opinion of the Court of Queen's Bench whether, from the facts stated in this case, and

referring more particularly to the occurrences at the meeting of the 8th of March, I was entitled to find that such an endeavour on the part of each of the appellants to force Longman to depart from his hiring by threats and intimidation as constitutes the offence contemplated by the Act of Parliament referred to has been made out.

If the Court should be of opinion that the said conviction was legally and properly made, then the said conviction is to stand; but if the Court should be of opinion otherwise, then my said judgment to be reversed.

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Macnamara, for the appellants: and *Tindal Atkinson*, for the respondents.

Cases cited:—*Ex parte Perham*, 5 H. & N. 30; 1 L. T. Rep., I.S., 91; *Walsby v. Anley*, 30 L. J. 121, M. C.

WIGHTMAN, J.—The 3rd section of the 6 Geo. 4, c. 129, is, "If any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, he shall be liable to be imprisoned and kept with or without hard labour for any time not exceeding three calendar months." And the question is, whether such a threat has been used by O'Neill and Galbraith, or either of them, as would warrant a conviction of them or either of them. It seems that a person was sent to the employers of Longman, who was to report as to the state of the work on which Longman was engaged for the employers, he having been only engaged by his employers as a foreman, but not for the purpose of executing a particular work, and it seems to have been the object of the society in question to prevent Longman being engaged. Upon the report of the person sent, who was Galbraith, the other defendant, it appeared that Longman was engaged in this employment, which was certainly obnoxious to the feelings of the society of which he was a member; and then, at a meeting of the society, at which Longman was present, O'Neill being in the chair, O'Neill asked him whether he meant to continue a member of the society of which he was then a member or leave the shop, that was, the employment in which he was then engaged, or whether he would stay at the shop and be dismissed by the club, and have his name sent round all over the country in a report and be put to all sorts of unpleasantness. He told O'Neill, if there was anything to undergo he would incur all the consequences. Several members having spoken, a resolution was passed, the result of which was, that he was turned out of the club. The question is, whether that was such a threat as would bring the case within the meaning of the Act of Parliament. Now, Longman was a member of

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the society; it was a society beneficial to those interested in it; no rule was infringed, and none was referred to as having been infringed by Longman remaining in the employment of his master; therefore, the effect of the threat was this: "If you do not leave the employment of Mr. Kruger, in which you now are, you shall cease to have the benefit of this club." The sending round to the club was to be by a report to the head officers all over the country, and to the place where Kruger carried on business. At this meeting it was said it would be sent round to the society, and Longman would be put to all sorts of inconvenience. It seems to me that this would operate most formidably on the mind of a person who felt that he would be deprived of all the benefit he would otherwise obtain from the club, to be dismissed from it and put to all sorts of unpleasantness. I hardly know what sort of threat can be intended to come within the meaning of this Act of Parliament, short of personal violence, if this was not such a threat. But it does not appear to me that the case is so satisfactorily made out against Galbraith, for all that he did was to ascertain from the masters whether they would allow Norfolk to remain at his work, and then he was to report to the society what he had heard from the masters. He merely does that; he uses no threat whatever; he does not say a word, nor does he in terms, nor as it appears in the case, in any way, assent to what was said, except as being present. Therefore it appears to me there is hardly a sufficient case against Galbraith. With respect to O'Neill, I think there is.

BLACKBURN, J.—I come to the same conclusion, that there was a threat within the meaning of the Act of Parliament, and that the conviction was right as against those who used that threat. That O'Neill himself was the man who spoke there can be no doubt. My own opinion, on looking at the whole case, is, that the magistrate was justified in drawing the conclusion that Galbraith and O'Neill were acting together, though O'Neill was the spokesman, that Galbraith was joining him, and that the conviction against both is good; but as that is a matter entirely on the weight of the evidence, I would not act on my own opinion against my brother Wightman's impression. I am content to join in the judgment that, as far as regards Galbraith, the evidence was not sufficient to justify the magistrate in drawing the conclusion that he was a party to the threat, and consequently that the conviction should be affirmed against O'Neill alone. In the Act the words are "by threats or intimidation to force or endeavour to force a workman to leave his work," and there was at one time a different opinion as to those threats, which it was thought must be in the nature of threats to do some violence. But the case of *Walsby v. Anley* decides clearly the principle we are bound to apply in the present case. There, two men, who did not belong to a masons' society, and had signed a declaration, were at work for their master. The persons who were convicted came in a body, and the words they used were, "You must discharge these

men who are working under the declaration, and if you do not, we will leave the work." The prosecutor refused to be dictated to, and then it seems that the other workmen, thirty in number, allowing out what they said they would do, left the work. The question was, whether a threat, "if you do not discharge such and such workmen, we will leave the work," was a threat within the meaning of the Act of Parliament. The decision was that it was such a threat, for though there need not be violence, there must be a threat, as the Judges who decided it (the Chief Justice, Lord Crompton and Hill, JJ.) agreed, and that it was sufficient if a threat of anything unlawful, or any act of combination, or conspiracy took place, such as, "we, in a body, will combine and act against you if you do not discharge a particular workman." Asking that to be the rule of law, was there evidence here to justify the magistrate in deciding that there was a threat that he (O'Neill), and others would do that which would amount to an unlawful conspiracy against Longman, unless he left his work? As to that we must look at the facts. [His Lordship then recited the facts as stated.] I think the magistrate might fairly draw the inference that Galbraith was acting in concert with O'Neill, and that what O'Neill said and did in Galbraith's presence afterwards, and what was said and done by Galbraith before, is evidence against him. There was no right under the rules of the club to turn Longman out. I dare say that the unwritten understanding was that they were to turn him out if he did not strike when they struck; but no such rule exists, and it would be illegal to turn him out. Still, if they honestly thought they were a society that had a right to turn him out, perhaps that might not have amounted to a threat. But when you look to what is said—that if he does not leave he will be dismissed by the club, have his name sent over the country, and be put to all sorts of unpleasantness—and knowing what was meant by the sort of unpleasantness—for during the time Norfolk was working for Kruger the body was confederating and employing all their influence to make a combination to deprive Norfolk of his work—I think that the magistrate might not unreasonably draw the conclusion that O'Neill was threatening, "If you do not leave your employment we will leave," and that is an unlawful threat, "We will in confederation strike against you." The statement that "we will act in combination with reference to the employment in which you are," comes to the same kind of threat as was used in *Walshy v. Anley*, which was simply this: "If you do not dismiss the men we will leave work;" but it is far stronger in degree. But we are not here to draw inferences of fact; we have to see whether the magistrate was justified on the evidence. I cannot say his decision was unreasonable. If it were for me to say whether it was properly drawn, I should say I agree with the magistrate, and draw the same inference. Neither can I doubt that any reasonable being would draw the same inference. But that is not the ground on which I decide, which is simply this—

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there is evidence here from which the magistrate might draw the inference. It is said that these people thought they were acting legally; if that is so, it is highly desirable that they should be made aware of their mistake. Every man has freedom for himself to work where he pleases, but that is not to extend to giving him liberty to coerce another, or to combine to deprive others of that freedom. O'Neill was guilty of the crime of which he was convicted, and though jointly acting with Galbraith, may be convicted separately, and therefore, as against him, the conviction should be affirmed. I will not differ with my brother Wightman, who thinks that the evidence against Galbraith was not sufficient, though I should entertain a different opinion.

Judgment accordingly.

COURT OF CRIMINAL APPEAL.

April 25 and November 24, 1863.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
MARTIN, B., and KEATING, J.)

REG. v. F. BURRELL and H. R. BURRELL. (a)

Abduction—24 & 25 Vict. c. 100, s. 53 (b)—Taking out of the possession of parent or guardian—Stepfather.

CASE reserved for the opinion of this Court by Williams, J.
This was an indictment under the statute 24 & 25 Vict. c. 100, s. 53, tried before me at the last Norfolk Assizes.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The 24 & 25 Vict. c. 100, s. 53, enacts, "Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress, or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession, and against the will of her father or mother, or of any other person, having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years with or without

It charged that Frederick Burrell fraudulently allured, took away, and detained one Jane Burrell out of the possession of her mother, and one William S. Hyder, he then having the lawful care and charge of her, she being then under the age of twenty-five years, and having then a present legal interest in real estates, with intent to marry and carnally know her.

And Henry Richard Burrell was charged with feloniously abducting, &c., to commit the said felony.

The two defendants were the paternal uncles of Jane Burrell, who was sixteen years old in February, 1863, and was entitled by her inheritance to real estates of the value of about 50*l.* a-year.

Her mother, Mary Ann Hyder, had married first James William Burrell, the father of Jane, and brother of the two defendants. He died in 1846, and the mother afterwards, in the year 1848, married W. S. Hyder.

Her daughter Jane lived with her and her step-father, at Fakenham, till she was sent to school by her mother, first to a school in Suffolk, in January, 1862, where she remained till August, 1862, when she came back to her mother's, and then, in October, 1862, to a school in Norwich, where she remained till December 20, when she came back to Fakenham for the Christmas holidays.

She arrived at her mother's house in the afternoon, and staid out half-an-hour, and then she left the house alone. About nine o'clock that evening she came back, and staid till ten, when she again left the house without her mother's knowledge or consent. She came back the next morning, and staid with her mother for about two hours, and then again went away without her mother knowing whither. In fact, she had gone to the house of her uncle, the defendant, Henry Richard Burrell, who also lived in Fakenham, and she continued there until the 9th of January, 1863, when she left Fakenham as hereafter mentioned.

She continued to pay visits to her mother for an hour or two nearly every day till the 19th of January.

It further appeared that in the interval between her coming home from school in Suffolk and her going to that at Norwich, it had been arranged at her own desire, in consequence of her not living happily with her stepfather and mother, that she should live with her mother's mother and brother, who dwelt together in Fakenham.

When she came back for the Christmas holidays she wished to remain with her mother; but the latter insisted on her daughter's abiding by her choice to go to her grandmother's for the holidays,

and labour; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as co-heiress, co-heiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall upon such conviction be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the Attorney-General appoint."

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and would not consent to her staying with her at her stepfather's house.

On this she went to the house of her uncle Henry Richard Burrell. Her mother, as soon as she discovered that her daughter was there, desired her to come to her house, and refused to let her have her clothes unless she did so.

On the 19th of January Frederick Burrell and the wife of Henry Richard Burrell left Fakenham together with Jane Burrell by the railway, and on the next day Frederick Burrell and Jane Burrell were married at the church of Plumstead, near Woolwich.

These occurrences took place under such circumstances as fully warranted the jury in finding that Jane Burrell was allured and taken away by Frederick Burrell with intent to marry her, and that Henry Richard Burrell aided, &c., in the committing of this act. And the jury accordingly convicted them.

But several points of law were raised by the counsel for the defendants, which I reserved for the consideration of this Court.

First, it was contended that there was no evidence that Henry Burrell had fraudulently allured and taken away the young woman within the meaning of the statute.

Secondly, that there was no evidence that she was taken out of the possession of her mother within the meaning of the statute.

Thirdly, that the indictment charged that she was taken out of the possession of her mother and of William S. Hyder, he having then the lawful care and charge of her, and that it was necessary to prove that she was in the possession of him, as thus alleged, as well as of her mother, when she was taken away.

But the only proof of that was, that the guardianship of her person and copyhold estate had been granted to him at a special court for the manor of Fakenham, when she was admitted as tenant of her copyhold estate in that manor. And it was contended on the parts of the defendants, that this did not show that he had the lawful care and charge of her within the meaning of the statute.

On the part of the Crown it was argued that at all events there was evidence that she was taken out of the possession of her mother, and that this was sufficient to sustain the indictment.

EDWARD VAUGHAN WILLIAMS.

April 25.—*Drake* (Metcalfe with him) for the prisoner.—The conviction cannot be sustained. First, there was no evidence that the prisoner Frederick fraudulently allured, took away and detained Jane Burrell out of the possession of her mother. Some meaning must be given to the word "fraudulently" in this part of the section. If it be said that the motive was a pecuniary one, and that that would satisfy the word "fraudulently," the answer is, that the preceding part of the section provides for that case expressly. There was no evidence of any false pretences or mis-

ments to satisfy the word "fraudulently." [MARTIN, B.—Can this Court know that the prisoner fraudulently allured young woman away except from the evidence? WILLIAMS, J. All the evidence is set out in the case on the point. POLLOCK, J.—This may have been a very honest love match; but was it a fraud against the child to pretend to marry her when could not legally do so?] Secondly, there was no evidence he took the girl out of the possession of her mother, within meaning of the statute. This case differs from *Reg. v. Atelow* (6 Cox Crim. Cas. 143; Dears. C. C. 159), inasmuch as the girl was not in the possession of her mother at the time. [WIGHTMAN, J.—The mother would not let her stop with him. It does not appear that either of the defendants knew that the mother had required her daughter to come back. [WIGHTMAN, J.—Sect. 55 would apply to the case of taking away a girl from school.] In *Hicks v. Gore* (3 Mod. 84), where a mother had committed her daughter, an heiress, under the care of a lady, to prevent her being run away with, the lady collusively married the girl to her own son while she was under sixteen. The marriage was without enticement and openly, it was held that the case was not within the penalties of 4 & 5 P. & M. c. 8. Thirdly, the indictment avers that W. S. Hyder had the lawful care and charge of the girl. Hyder, the second husband of the girl's mother, had nothing to do with the care and charge of her: see *Cliffe's case*, 3 Co. R. 38.) Although he had been admitted her guardian on the court-rolls of the manor, that does not constitute him guardian of her person. The prosecutrix was bound to prove that averment in this indictment, and not having done so, it is submitted that the prosecution cannot be sustained. *Answer*, for the prosecution.—First, as to the word "fraudulently." If any evidence of fraud is requisite, there was sufficient. The construction of the statute is obvious. Sect. 53 creates two classes of offences: the first is, "to take away or detain" any woman, &c., against her will, without reference to her age, contemplating the case of an heiress capable of giving consent to her marriage; but when the Legislature comes to deal with the case of an heiress under the age of twenty-one, and incapable of giving such consent, then the will to be violated is not the will of the woman, but of the person having the lawful care of her; it is made an offence not only to "take away or detain" such a woman out of the possession of such person, but also to "fraudulently allure" the woman out of the possession, &c. Where the offence is "taking away" or "detaining," it is not necessary to prove fraud; but where the offence is "alluring," it must be alleged and proved to have been a fraudulent alluring, whatever that may mean. It is quite sufficient to support this indictment, that here the uncle took away and married his niece, who was under age, without the knowledge of the person who had the lawful custody of her. The concealment of the fact from the lawful guardians is quite sufficient evidence of fraud. The

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fraud is against the persons having the lawful custody of and who, by law, have the power of giving their consent. [POLLOCK, C.B.—The consent is immaterial, as the marriage is wholly illegal. WIGHTMAN, J.—Do you contend for the conviction of both? WILLIAMS, J.—There was evidence of abetting and abetting which is not stated in the case.] The language of this part of the section is not, as in the first part, against the will of the woman, but against the will of her father or mother or other person having the lawful care of her. In *Ratcliffe's* case was held, that the mother of a child who marries again is not to the legal charge and custody of her child. [WIGHTMAN, J.—The girl is not in the actual possession of her mother.] As to that the girl was living at her uncle's with the consent of her mother, why is she not then in her mother's custody and possession? The other side must contend, that if she was at her mother's, she was not in her mother's possession. The mother must not abandon her controul. It was arranged that she should live with her mother's mother and brother. It is sufficient to sustain this prosecution that the mother had a right to the possession and care of her daughter. In 1 East, P. C. 457, it is said in *Hicks v. Gore* wants more consideration. In *Reg. v. Kipps* (Crim. Cas. 167), Maule, J. said: "The law throws a prohibition upon young persons of the sex and within the age specified in the statute 9 Geo. 4, c. 31, s. 20. It has been determined by the Legislature that at that age young females are not able to give consent to themselves, or give any binding consent to a matter of this description. It is therefore quite immaterial whether the girl has given consent or not; if her family, that is to say, the person or persons under the statute may lawfully have the possession and controul over her, do not consent to her departure, the offence is complete." So again *Reg. v. Manktelow* supports this view of the case. As to the third objection, it is not necessary to prove consent about the second husband having the lawful custody of the girl. That is surplusage, and may be struck out of the indictment.

Metcalfe, in reply, referred to *Reg. v. Handley* (1 Fosc. 648).

Cur. adv.

November 24.—POLLOCK, C. B.—The prisoner, Frederick Handley, was indicted for fraudulently alluring, taking away, and detaining a young female out of the possession of her mother. One W. S. Hyder, he having the lawful care and charge of her, and the other prisoner was indicted for aiding and abetting. The Court is divided in opinion on the facts, not on any point of law. If there had been a difference in our opinion on the facts, the case in the ordinary course would have been directed to be argued before all the Judges. But as it is, we think that the Judges may well act according to the opinion of the majority of the Judges who heard the argument, and hold that the facts

sustain the prosecution, and that in point of fact the crime was not proved. As I said before, there is no difference among the Judges as to the law.

Conviction quashed.

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BAIL COURT.

November 25, 1863.

(Before CROMPTON, J.)

REG. v. THE CORONER OF YORKSHIRE.

Inquisition—Coroners' Act—Juror hearing part only of the viva voce evidence.

After a coroner's juror had viewed the body and heard part of the evidence, another person was sworn, viewed the body, and took part in the proceedings on hearing that portion of the evidence which had been previously taken read over to him:

Held, that this was a sufficient ground for bringing up the inquisition.

THIS was a rule calling upon the coroner of Yorkshire to show cause why a *certiorari* should not issue to bring up an inquisition taken before him. The application had been made on the part of a Mr. Ingham, on whose mill a boiler had burst, causing the death of one of his workpeople, and the jury found him guilty of manslaughter.

Cleasby, Q.C., now showed cause.—The first two grounds on which the rule was obtained were, that the cause of death, and the time of committing the offence, did not sufficiently appear on the face of the inquisition; the inquisition stating merely that the defendant "did feloniously kill and slay." This defect is cured by the 4th section of 14 & 15 Vict. c. 100, which enacts that, "in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient in

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every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice afore-thought, kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased." By the interpretation clause, "the words 'indictment' shall be understood to include information, inquisition," &c. The 24th section provides that "no indictment for any offence shall be held insufficient for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence." The Coroners Act (6 & 7 Vict. c. 83), by the 2nd section, enacts that inquisitions shall not be quashed on account of technical defects; one of which is enumerated as "the omission to state the time, when time is not of the essence of the offence." [CROMPTON, J.—What do the words "where time is not of the essence of the offence" mean?] They exclude cases of burglary, and offences against some of the game laws. [*Temple, Q.C.*, who appeared in support of the rule, here stated that the Court had granted the rule on these grounds, because, on referring to the 14 & 15 Vict. c. 100, it did not appear to apply to inquisitions. On this part of the case he should contend that the time must be stated, and where it must be stated, the manner and means of death must also be stated.] The Court, however, has, if necessary, a power of amendment. The third ground was, that the jury did not view the body before the proceedings had commenced, nor at the proper time, nor in the proper manner. It appeared from the affidavits that fourteen or fifteen jurors assembled, and after they were sworn, went and viewed the body. Another person then came into the room where they were, and told the coroner that he also had viewed the body (wishing to form one of the jury). The coroner ordered him to be sworn, and taken back by a policeman to view the body again, which was accordingly done. Upon his return, that portion of the evidence which had been previously taken was read over to him. One objection was, that all the jurors did not view the body at the same time; but the 2nd section of the Coroners' Act cured this defect also: it provided that "no inquisition shall be quashed, &c., because the coroner and the jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the inquest." There had been no adjournment, and this was the first and only sitting; the mere fact of another juror coming in would not constitute a second sitting. [CROMPTON, J.—The next objection, I suppose, is, that the juror who came in last did not hear all the evidence?] Yes, that he did not hear it all given *vivâ voce*. [CROMPTON, J.—It seems to me to be one of the strongest objections.] The impression of the court above was, that the inquisition should not be quashed by reason of a mere irregularity. There are no authorities on the subject except as to cases of misconduct. [CROMPTON, J.—The objection that the jury did not view the body at the same time goes to the jurisdic-

tion.] This is nothing more than an irregularity. An inquisition is traversable, and merely puts a man on his trial. [CROMPTON, J. But here is a man put on his trial by a juror who has not had an opportunity of observing the demeanour of all the witnesses. This may be done by consent in civil, but not in criminal cases.] The jury might proceed without any evidence at all—upon their own knowledge. The irregularity cannot go to the root of the proceedings.

CROMPTON, J.—I have a strong opinion that the alleged defects on the face of the inquisition are cured by the acts which have been referred to; but I am against you upon the other point. I never allow a grand juror to be sworn after the charge is begun; much more ought every grand juror to be present when a bill is brought before them. I think this case should be put into the Crown paper; then fresh affidavits may be filed, if necessary, and the matter be more fully discussed.

Rule absolute.

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COURT OF CRIMINAL APPEAL.

November 14, 1863.

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ.,
MARTIN, B., and BRAMWELL, B.)

REG. v. THOMAS AND WILLETT. (a)

*Treasure trove—Concealment from the Crown—Occultatio fraudulosa—
Evidence.**In an indictment for concealing the finding of treasure trove from the Crown, it is not necessary to aver that the prisoner concealed fraudulently. The words "unlawfully, wilfully and knowingly," are sufficient.**A., in ploughing, found large rings of old gold of considerable value and sold them for brass to B. for 5s. 6d., saying where he found them. B. afterwards found out that they were gold and offered them to a jeweller for sale as gold. Then B. said he had sold them to C. for brass. Then B. and C. were at a bank together, depositing part of the proceeds for which C. had sold the gold rings:**Held, that there was evidence to support a conviction of both B. and C. for knowingly concealing treasure trove from the Crown.***C**ASE reserved for the opinion of this Court by Bramwell, B. at the Sussex Summer Assizes, 1863.

(Copy Indictment.)

Sussex } The jurors for our Lady the Queen upon their oath pre-
to wit. } sent, that heretofore and before the committing of the offence hereafter mentioned, to wit, on the 12th day of January, A.D. 1863, one William Butchers, a labourer in the employ of one Thomas Adams, farmer, of the parish of Mountfield, in the county of Sussex, while he, the said William Butchers, was ploughing in a certain field in the occupation of the said Thomas Adams, at the parish aforesaid, in the county aforesaid, did find hidden in and under the ground and soil of the said field certain treasure of gold of the value of 500*l.* and upwards of lawful money of Great Britain, and which said treasure was of ancient time hidden as aforesaid, and the owner whereof at the time when the same was so hidden as aforesaid cannot now be found. And the jurors aforesaid, upon their oath aforesaid, do further present that our Lady the Queen, in right of her Royal Crown, and by virtue of her Prerogative Royal, is, and at the time of the said finding was, entitled to the said

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

treasure so found as aforesaid. And the jurors aforesaid upon their oath aforesaid, do further present that Silas Thomas, of the parish aforesaid, in the county aforesaid, labourer, and Stephen Willett, of the parish of Ore, in the county aforesaid, labourer, from the said 12th day of January in the year aforesaid, to the time of taking this inquisition did unlawfully, wilfully and knowingly conceal the finding of the said treasure from the knowledge of our Lady the Queen, against the peace of our said Lady the Queen, her crown and dignity.

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(Copy Inquisition.)

Rape of Hastings, Sussex, } An inquisition taken for our Sovereign
to wit. } Lady the Queen, at the dwelling-house of
Richard Thompson, known by the name of the John's-cross Inn, in the parish of Mountfield, in the Rape of Hastings, in the county of Sussex, on the 27th of March, 1863, before me, Nathaniel Polhill Kell, gentleman, Coroner for the said Rape, by virtue of my said office, and of the statute in that case made and provided, upon the oaths of Isaac Mannington, James Crouch, Thomas Buss, Robert Fuller, Daniel Olney, John Tynon, Edward Muggeridge, Thomas Badcock, James Moon, Richard Kempson, George Hayward and Isaac Thompson, the several persons whose names are hereunder written and seals affixed, good and lawful men of the said Rape duly chosen, and hereby assembled before me at the time and place aforesaid, and now here duly sworn and charged to inquire on the part of and for our Sovereign Lady the Queen, of and concerning certain treasure lately found in the earth and soil of and in a certain field situate and being in the said parish of Mountfield, and in the occupation of one Thomas Adams, of the said parish of Mountfield, farmer; and they the said jurors, being duly sworn and charged, upon their oath aforesaid, to inquire on the part of our said Lady the Queen of and concerning the said treasure as aforesaid, and having heard evidence upon oath produced to them, do, on their oath aforesaid, say, that on the 12th January, 1863, William Butchers of the said parish of Mountfield, labourer, being employed by the said Thomas Adams in ploughing in the said field, did then and there find deposited, hidden and concealed in and under the earth and soil of the said field, in the parish of Mountfield aforesaid, in the Rape aforesaid, certain pieces of old gold of the weight of 11lbs., or thereabouts, and of the value of 530*l.* and upwards sterling of current moneys of this realm, and which said pieces of old gold were of ancient times deposited, hidden and concealed as aforesaid, and that the owner or owners thereof cannot now be known. And the jurors aforesaid, upon their oath aforesaid, do further say that the said several pieces of old gold so deposited, hidden, concealed, and found as aforesaid, before and at the time of so finding the same as aforesaid, were, and from thence hitherto have been, and still are, the gold, money and property of our said Lady the Queen; and the jurors aforesaid upon their oath aforesaid, do further say that the said William Butchers and Silas Thomas, of the said parish of Mountfield, bricklayer, and Stephen Willett, of the town and port of Hastings, cab proprietor, from the time of the said finding until and at the time of taking of this inquisition at the said parish of Mountfield, in the said Rape of Hastings, in the said county of Sussex, concealed the said finding of the said several pieces of old gold from me the said Coroner, and from our said Lady the Queen, and did not make known the said finding to any person or persons whomsoever

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lawfully authorised or empowered to receive the said old gold, or the information respecting the finding thereof, on behalf of our said Lady the Queen. And the said jurors do further say that the said William Butchers and Silas Thomas are now respectively in full life, and living in the said parish of Mountfield, in the said Rape of Hastings, and that the said Stephen Willett is also now in full life, and living at the town and port of Hastings aforesaid. In witness, &c.

(Copy Evidence.)

William Butchers.—In January last was in the employ of M Adams. He occupied a farm at Mountfield. I was ploughing there in the barn field; my son James was with me. I ploughed up a long piece of metal; my share caught it out. As soon as it caught hold of it, it threw me out. I judged it was 17 or 18 inches deep: it was deeper than it had been ploughed before. Something stopped the plough; it was a long piece of metal like brass, a trumpet on each end. It was doubled up like this (a coil of string). Boy took it and laid it down. I looked down and saw more in bottom of furrow, and found more; some rings and other pieces; two pieces about this size; little rings and other pieces: if cut asunder, several pieces, altogether near twenty. My boy carried them to the bottom of the field; they remained till I left ploughing, then boy carried them home. In the evening I showed them to wife and others. Next morning Brett saw them; then Thomas Adams I showed them. Thomas, the prisoner, is a bricklayer at Mountfield. I passed where he was at work at end of that week. I said, "Did you ever lay anything in this field yet that did not want any one to see?" He said "No." I said, "Because I have found a funny concern." He said he should like to see it. He came; he saw it, and said it was some finery from a gentleman's hall or parlour. Next week I passed him at work. He said, "Have you sold that old brass?" I said "No." He said "I have a brother-in-law at Hastings who buys old brass. I don't know how much he gives." He said he should like to see it again. He did not come. After dinner I again passed where he was at work. I took two pieces, two of which I had found. The pieces I took were a large ring like this, and another like a part of this. He said, "Do you mind leaving them?" I said no, and left them. He came towards dark; he brought a basket and a pair of steeple yards. He said, "I don't know much about this; but will give you 6d. a pound." I was agreeable. It was weighed. He said it weighed 11 lbs.; with basket 13 lbs. He paid for it 5s. 6d. He said, if his brother-in-law gave him any more, he would give it to me, as he knew I was a poor fellow. I heard no more of it for some time. Then people began to talk. I heard of a letter. People laughed and jeered at me, and asked if I had more old brass to sell. I saw Thomas. I said, "Silas, I want to speak to you." He said, "What about that old brass?" I said, "You don't act like a man; and give me more as you promised." He said he should, to be at his promise, but he had received no more.

He said his brother-in-law had got it at Hastings, but did not know whether it was silver or not. It might be worth 2*l.* or 3*l.*, and what there is, I'll give you a part. This was some weeks after. I went to Thomas on Sunday morning. He said he had seen his brother-in-law yesterday, and he paid me 5*s.* 6*d.* for it. He said, "I can't give you any more, can I?" I said "No." He said, "My brother-in-law is at my mother's." We went. Thomas went in, and said he is not up. I stayed some time, and Willett came out. We three and others were left together. He said, "What is this disturbance about—this old brass? What are you dissatisfied about?" I said, "I didn't know I was dissatisfied, only there was a great disturbance." He said, "I paid Thomas 5*s.* 6*d.* for it yesterday." On that same Sunday I found more gold. I went to the field that Sunday, Aaron Brett with me. I had stuck a stick in the spot. I took a spade; I dug in same place. I found two pieces of metal; Aaron Brett picked them up. This one has been broken in two. I took one piece to my master; Brett took the other. Remember Court sitting at Battle. Before then, the day before, the prisoners came to me, Thomas asked me if master told me I was to sell it. I said, "No." He said, "Can you go to Battle along with me?" I said, "I will lay my life it is gold." He said, "We all know that now." Willett was near enough to hear.

Cross-examined.—It was on point of share.

Re-examined.—I dug the other piece from depth of 18 inches. The plough uncovered the quantity not turned up. Plough raked down deeper this time.

James Butchers.—I was with father. I saw it on ploughshare—on the tip. Took it for brass.

Thomas Adams.—I occupy the farm. In January last Butchers was in my employ. He showed me, Jan. 13, at 7 a.m., some metal in the stable; some in rings. One a long piece; it stretched out nearly a yard long. It was doubled up like a piece of string. On 22nd Feb. Butchers showed me this. He left it with me. I gave it my father.

Thomas Adams, sen.—My son gave me this on 22nd Feb. I kept it till Monday; then I gave it to Thompson. I marked it; the "M." not there then.

Aaron Brett, labourer.—On Jan. 13th I went to a stable. Butchers brought metal in an old sack; I thought it brass, like what he described. One Sunday, some time after, Butchers came to me; I went to the field. There was a stick. He took a spade, I a stick. He dug, and I took out this gold. I kept the flat piece; I gave it to Sinden the blacksmith.

Cross-examined.—Hole 14½ inches deep.

Re-examined.—These two pieces were 7½ inches below surface.

Joseph Sinden, blacksmith.—Brett brought me a piece of metal on a Monday morning. These two then in once piece. I tried it with aquafortis. I found it to be gold. I gave it to police. I found a letter on my premises a day or two after, I opened it.

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Thomas came, I told him I had found a letter respecting the metal found. I gave it to him. It was directed to the ploughboys of Mountfield. It said something about pitying the ploughboys of Mountfield, selling it for brass when it was worth 150*l*.

Cross-examined.—Thomas had said it was not gold.

William Bell, policeman.—I received these pieces from Joseph Sinden. In one piece, no mark then on it. I gave it to Thompson.

Thomas Chettle. — In January last I was in the employ of Ray, jeweller, Battle. Thomas came early in February. He showed me gold, part of a large ring, bigger than this. The other looked as if gold had been run down in a rough way. He wanted to know if it was gold. I said it was. He said, "Will you buy it?" I said, "In the morning, but not by this light." He said there was more of it. He said he would come in the morning. He did not.

Thomas Eldred.—I keep Half-moon, Battle. Thomas came to my house for refreshment. He showed me a piece of metal. I might be in February. I think it must be February. He asked my opinion what it was? I said gold. I said, "If you go to Mrs. Ray's she or her assistant will tell you what it is." He said "I have been there." He said there was considerable more of it. Many pounds, in long pieces and ornaments. He said it was found on a farm at Mountfield. I think Taylor's. He said it had been ploughed up.

Cross-examined.—There was half-a-dozen people there. He made no secret of it, showed it to everybody. My place may be four miles from Mountfield.

Farra Broom, assistant to Browne and Wingrove, gold refiners Cheapside.—A man came to me with gold to melt, Jan. 23. I did not speak with certainty to either prisoner. The man wore a beard and moustache. He produced gold from a handkerchief. Small rings and two lumps, which had been melted down. Maybe twenty rings. A good many pieces. Such as we get from Barbary. This was about eleven. I saw it put into the scales. It was sent to melting place. I left. Man gave the name of Stephen Willett.

Alfred Clarke, assistant to Browne and Company. A man brought paper to me with gold. Man thirty-five years old, beard and moustache light. I paid for the gold which was left in the morning. It had been assayed and weighed. I gave a cheque on Glyn's 529*l*. 13*s*. 7*d*. (read).

John Thompson, superintendent of police, Battle.—Feb. 23, I went to Robert's-bridge. Received this round piece of gold. The mark "M." was put on some time after. I went to Thomas's house after ten at night. I called him out. I said, "What have you done with the metal bought of Butcher?" He said, "I have sold it to my brother-in-law, Willett, of Hastings." I said, "Do you know it is reported to be gold?" He said, "I don't know. I bought it and sold it for brass. I gave 5*s*. 6*d*. for it, and my brother-in-law

gave me the same." I said, "To whom has he sold it?" He said, "I don't think he has sold it. I think he has it now." Next morning I went to Willett's, asked his name, and if he had a brother-in-law, Silas Thomas, at Mountfield. He said, "Yes." He had a moustache. I said, "I am a superintendent, and have come to ask if you have not bought any metal." He said, "Yes; and I have disposed of it." He again said, "I have disposed of it more than once." He said, "I bought it for brass, and sold it for brass. I gave 6d. a pound for it, and sold it for 6½d." He said, "I ought to know what gold is. I have been to California."

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Cross-examined.—He wore a beard. I took him then.

The prisoners' counsel having addressed the jury, a verdict of "Guilty" was returned.

I discharged them on bail, to appear and receive judgment if necessary, and reserved for the opinion of the Court of Criminal Appeal two questions:—

1. Whether the indictment and inquisition, or either, is sufficient in law?

2. Whether the evidence against both prisoners or either was sufficient to justify the verdict.

(Signed)

C. BRAMWELL.

Denman, Q.C. (Hance with him), for the Crown.—It is submitted that the conviction was good. The points reserved were:—

1. Whether the indictment is good? 2. Whether there is evidence to go to the jury? The indictment alleges that the prisoners, "unlawfully, wilfully, and knowingly," concealed the finding of the treasure from the Queen, and it was contended at the trial that it was bad for not averring that the prisoners concealed the treasure "fraudulently." The prisoners' counsel argued that the word "fraudulently" was necessary, on the authority of the following passage in Co. 3rd Inst. c. 58:—"Treasure trove, is when any gold or silver, in coin, plate, or bullion hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the King, or to some lord or other by the King's grant or prescription. The reason wherefore it belongeth to the King is a rule of the common law, that such goods whereof no person can claim property belong to the King, as wrecks, strays, &c. . . . It appeareth by Bracton and Glanvil also, that *occultatio thesauri inventi fraudulosa* was such an offence as was punished by death."

It will be found, however, if the authorities are carefully examined, that "*fraudulosa*" in this passage means nothing more than the wilfully and knowingly concealing the treasure trove. In Black. Com. 295, treating of the King's prerogative, "treasure trove" is stated to be "where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth or other private place, the owner thereof being unknown, in which case the treasure belongs to the King." In Glanv. lib. 1, c. 2, the words used are, "*occultatio inventi thesauri fraudulosa*," and in lib. 14,

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c. 2, it is said, "A plea *de occultatione inventi thesauri fraudulosa* is usually managed in the manner above stated where a certain accuser appears:" (Beame's translation, Lond. 1812, p. 352.) I Bracton, lib. 3, de Coronâ, ff. 119, 120 (edit. 1569), the words are "*Est inter cætera gravis præsumptio contra regem et dignitatem et coronam suam quæ quidem est quasi crimen furti scilicet occultati thesauri inventi fraudulosa ut si quis accusatus fuerit quod thesaurum inveniret, scilicet aurum vel argentum vel aliud genus metalli quocunque loco cum super hoc apud bonos et graves fuerit diffamatus per patriam, &c. . . . Est autem thesaurus quedam depositi pecunie vel alterius metalli, cujus non extat modo memoriâ ut jam dominum non habeat et sic de jure naturali sit ejus qui inveniatur non alterius sit.*" In Britton (edit. 1640) De Coroners, c. 1, the word "maliciously" and not fraudulently is used, "*Et volens quod come nule felonie ou mesaventure soit avenue ou que tresor soi trov desouthe terre mauveyement musce.*" The translation by Kelham (edit. 1762), is "It is our pleasure, as soon as any felony or misadventure has happened, or treasure be found *designedly* concealed under ground," &c., that the coroner, as soon as he has notice, issue his precept. (See also Fleta, p. 61; The Mirror, c. 1, s. 13; c. 3, s. 28, p. 165; and Stat. 4 Edw. 1 st. 2; Staunforde Pleas del Coron. (1583), c. 42, p. 39, tit. "Treasure trove;" Chitty's Prerog. (edit. 1820), p. 152; Hawley P. C. C. 101, s. 57.) The result of the authorities is, that "fraudulosa" is not the essential word in the indictment, and need not be alleged. The offence is the knowingly concealing treasure trove without making it known to the coroner. The only precedent of an inquisition the Crown officers have discovered, is one drawn by Lord Abinger, when Attorney-General of which the inquisition in this case is a copy. The indictment contains the additional words "unlawfully, wilfully, and knowingly." Secondly, the offence was proved as against both prisoners. It is shown that treasure trove having been found the prisoners knew it, and while it was in their possession concealed it from the Queen. [MARTIN, B.—I do not see that the evidence is so clear that Thomas did know that what he was buying was gold.] There is evidence that he knew the circumstances under which the things were found; but not that at the moment of the purchase he knew that they were other than brass. [MARTIN, B.—The evidence is that Butchers found the metal which he believed to be brass, and that Thomas bought it of him under the same belief, but afterwards discovered that it was gold, and neglected to give any information.] The policeman's evidence is important to show that both were knowingly concealing the finding of the treasure from the Crown.

Ribton (*amicus curiæ*) referred the Court to *Reg. v. Fitzsimon*. (4 Cox Crim. Cas. 246). In that case the Court of Criminal Appeal in Dublin held that it was necessary in an indictment on the 31 Geo. 3, c. 31, for driving away cattle under colour of a civil bill decree, to aver that the party did so fraudulently.

ERLE, C.J.—I am of opinion that in this case the conviction was good. It appears to me, first of all, with respect to the form of the indictment, that there is no law which has said that it is essential to the validity of the indictment that the concealment should be charged to be a fraudulent concealment. The old authorities describe the offence to consist in the "*occultatio fraudulosa*;" for two or three use the word *fraudulosa*, and two or three more show clearly what they mean by it, viz., that the party knew that he was concealing from the King treasure trove without any of the excuses which it is afterwards said the party may bring forward. He may say, "I hid it myself." He may say, "My friend hid it and I knew it at the time, and I always intended to find it." He may have other causes which will justify the concealment. We find that the meaning of the words "*occultatio fraudulosa*" in the earlier writers was an unlawful concealment, because the offence is, that if you know that it is treasure trove and do conceal it, you are guilty of an unlawful act, "*occultatio fraudulosa*," unlawful concealment. The whole line of authorities, which we are very much obliged to Mr. Denman for going through, satisfies us that it is by no means the essence of the offence that it should be a fraudulent concealment. If a statute makes an offence and uses a word by which the defendant is to be indicted under that statute, that word must be used. If a statute gives a short form of indictment and says that the description of the offence may be as follows, then using that short form of indictment, the leaving out of the essential description which is given in that short form loses the benefit of the statute which gives that form. Nothing of that sort applies to the present case. Then as to the offence itself, the law is perfectly clear. At one time this was a branch of the revenue to which importance was attached. Probably it may have been, after disturbed times, a source of considerable wealth. The Queen has a right to the treasure which is concealed, and the party who finds it is bound not wilfully to hinder the finding from coming to the knowledge of the Queen's officers. If he is guilty of a wilful act of concealment by which he has deprived the Queen of this treasure, that is the offence which all the law writers have laid down, and that is the offence charged in this indictment. The facts are, that a ploughman came upon a quantity of gold; that he was a perfectly innocent finder; that he believed it to be brass, because he sold it for brass. But the two persons here indicted, namely, Thomas and Willett, knew from the beginning that it was gold, and knew where it was found from Butchers the finder; they got from him with a payment as for brass the gold which he had so found; they sold it for its value as gold; they continued to assert with falsehood that they had received only brass and sold it for brass. To my mind there is very clear evidence that Thomas was informed by Butchers of the field where the treasure was found, and the nature of the article, and Thomas from the beginning said, "My brother-in-law will

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dispose of it." That brother-in-law being Willett, was applied to; he said, "I have been in California; I know what gold is;" and he is the person who takes this for brass; he joins in paying for it as brass; and is the man who sells it for gold, and has the benefit of the account which is opened out of the proceeds.

WIGHTMAN, J.—Agreeing, as I do, with the Lord Chief Justice in the nature of the offence which is charged, I should not have thought it necessary to say one word upon the matter but that I am not satisfied that in this case there was any sufficient evidence to show that Willett knew of the finding of the treasure. The offence is, the concealing the finding of the treasure, knowing that it had been found under such circumstances as would make it treasure trove, and render it necessary to inform the Queen of it. But in this case I do not find any evidence to satisfy me that Willett knew that it was treasure trove, and that it had been found under such circumstances as would make it treasure trove. He seems to have given a very inadequate price for it, and if this had been an indictment for receiving stolen goods, knowing them to have been stolen, there certainly might have been sufficient to warrant a conviction. But, as it is, I confess that I am not satisfied (I say no more than that) that there was sufficient evidence to warrant any verdict as against Willett. However, the rest of the Court are of opinion that there was sufficient evidence, and therefore it is unnecessary for me to say more than that I do not feel satisfied that it was sufficient.

WILLIAMS, J.—I am of the same opinion as the Lord Chief Justice upon the law and upon the question whether there was sufficient evidence against Willett. I think that it was for the jury, and I would only say that I think that, in addition to the direct evidence in the case, there is a fact which must not be lost sight of, and which would probably be considered by the jury, namely, the extraordinary and significant nature and appearance of the articles.

MARTIN, B.—I am also of the same opinion. I take the offence to be that which is stated in the passage read from the Third Institute, that it is a fraudulent concealment of found treasure, that treasure being gold or silver. The first question is, is that alleged in the indictment? And it seems to me that, in the absence of any authority to the contrary, the allegation that the prisoners unlawfully, wilfully, and knowingly concealed the finding amounts to that. If there had been any authority to the effect that the word "fraudulent" must of necessity be used in the indictment, I would have bowed to it, but the authority cited by Mr. Ribton by no means goes to that effect. I have looked into the precedents in Chitty on Pleading, and the text also, and I find no case which goes the length of saying that, when special demurrers existed, in an action for false and fraudulent misrepresentation, the word "fraudulent" must of necessity be used, and that it would not be competent to use equivalent

words. If that be so, it seems to me that the indictment is right. The next question is, Is there evidence against these two prisoners? Now the doubt which I had originally, and the reason why I requested Mr. Denman to read the evidence was, that it struck me that the offence was committed upon the first concealment, namely, that the first person who arrived at the knowledge that this article had been found in the manner in which it was found, and who knew that it was gold, was the guilty party; and if there had been any guilty party anterior to the two prisoners, I should have required to have looked into the authorities upon accessories. But it seems to me clear that Butcher was an innocent agent in this matter, and was not guilty of any crime at all, and that the first person who was criminally guilty was Thomas, he being aware of the fact that it was gold; and I own that it seems to me that the question is not whether, if I had been a jurymen, I should have convicted the prisoners, but whether there was evidence to go to the jury, and whether my brother Bramwell was bound to let the case go to them; and without saying that if I had been upon the jury I should not have participated in the doubt of my brother Wightman and have acquitted the man Willett, it seems to me that the most probable state of things is that the first prisoner, Thomas, bought this article believing that he had made a good bargain of brass; that he then went to his brother-in-law, and that they made some further inquiry about it, and I should apprehend that the two together ascertained it to be gold by going to a goldsmith; and that being ascertained, Thomas sent Willett to London, and he got the money, and they divided it between them. It appears to me that such was the transaction, and that there certainly was evidence to go to the jury, and that we must uphold the conviction.

BRAMWELL, B.—I cannot help saying with very great respect that it appears to me that there is evidence against Willett. He says, "I bought it for brass and sold it for brass. I gave 6d. a pound for it and sold it for 6½d." That is utterly untrue. It shows that he knows something wrong has been done which must be concealed; and if it had been shown *aliunde* that this gold had been stolen, this would prove guilty knowledge. But where you show *aliunde* that another offence has been committed, why does not this show guilty knowledge? It seems to me almost a matter of demonstration that it does show it. Supposing that it had been a case of stealing, it shows guilty knowledge on the part of Willett, and I therefore think that there is evidence against him.

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Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 21, 1863.(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ.,
MARTIN, B., and KEATING, J.)

REG. v. ISRAEL HILLMAN. (a)

*Procuring poison or noxious thing—Intending to be used—Abortion—24 & 25 Vict. c. 100, s. 59.**A person supplying a noxious drug to a woman with the intent that a woman should take it for the purpose of producing a miscarriage, guilty of a misdemeanor within the 24 & 25 Vict. c. 100, s. 59, although the woman herself did not intend to take it.*

CASE reserved for the opinion of this Court by the Chairman of the Wiltshire Quarter Sessions.

At the Midsummer Quarter Sessions for the county of Wilts, holden at Warminster, in the said county, on the 30th of June, 1863, Israel Hillman was charged in and by an indictment framed under sect. 59 of the 24 & 25 Vict. c. 100, with unlawfully supplying and procuring a certain poison or noxious thing called *savin*, knowing that the same was intended to be unlawfully used or employed by one Sarah Carrier to procure the miscarriage of the said Sarah Carrier.

Upon the trial it was contended by the counsel for the defendant that there was no case against the defendant because, amongst other objections, it was necessary that the defendant should know that the poison or noxious thing is intended to be unlawfully used or employed with intent to procure the miscarriage of the woman, whereas it was not so intended, except by the defendant himself, to be used at all.

I left the facts to the jury, and they being satisfied, as the evidence well warranted, that the case was in other respects proved, found in answer to the questions of the Court, and in accordance with the evidence, that the prosecutrix did not intend to take the substance in question, nor did any other person, except only the defendant himself, intend that she should take it.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The jury then under my direction found a verdict of guilty, and the Court admitted the defendant to bail to appear at a future sessions to receive sentence (if necessary), and I now pray the opinion of this honourable Court as to whether or not the intention of any other person, besides the defendant himself that the substance should be used to procure a miscarriage, is necessary to constitute the offence with which the defendant was charged.

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J. W. AUDREY,
Chairman of the Quarter Sessions.

T. W. Saunders for the prisoner.—The 59th section enacts that whosoever shall supply or procure any poison or other noxious thing knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor. This section creates a new offence and contemplates a case only where the procurer and the recipient have the same intent. Here it is found that the woman did not intend to take the poison. The present case is not within the section, and it may be *casus omissus*.

No counsel appeared for the prosecution.

ERLE, C.J.—The question is, whether or not the intention of any other person besides the defendant himself, that the poison or noxious thing should be used to procure a miscarriage, is necessary to constitute the offence charged under the 24 & 25 Vict. c. 100, s. 59. We are all of opinion that that question must be answered in the negative. The statute is directed against the supplying or procuring of poison or noxious things for the purpose of procuring abortion with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The defendant knew what his own intention was, and that was, that the substance procured by him should be employed with intent to procure miscarriage. The case is therefore within the words of the Act. We confine our judgment to the question submitted to us. The conviction will therefore be affirmed.

The rest of the Court concurring,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 14, 1863.

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ., MAJ
and BRAMWELL, BB.)

REG. v. GEORGE THALLMAN. (a)

Nuisance—Exposure of person—Public place.

It is sufficient to support an indictment for indecent exposure of person, if the act is done in a place where a great many people see it, although that place is not a highway; as where the exposure took place on the roof at the back of a house where it could be seen from the back windows of many neighbouring houses, and was seen by several persons therefrom.

CASE reserved by the Deputy Assistant Judge at the Middlesex Sessions.

The prisoner was tried before me in the Second Court, at Middlesex Sessions, on the 25th of August last, on an indictment which charged that he in a certain open and public place, that is to say, on the roof of the dwelling-house of one G. H. C. situated in a certain open and public street called Albemarle-street, in the parish of St. George, Hanover-square, and near the dwelling-houses of divers of the liege subjects of the Queen situated in that parish, and also in and near the said open public street and common highway called Albemarle-street, within the sight and view of Elizabeth Aulsebrook and Mary Day, and of many other of the liege subjects of the Queen then residing and dwelling, and along and through the open and public street and common highway there going, returning, passing, repassing, did unlawfully, wilfully, publicly, and indecently expose his person and private parts naked, and did continue on the roof of the said dwelling-house, and near the dwelling-houses aforesaid, &c., with his person exposed, &c., for the space of two minutes, to the great damage and common nuisance of the said Elizabeth Aulsebrook and Mary Day, and of all other the liege subjects of the Queen, then and there being, and then and th

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-law.

residing and dwelling, and along and through the open and public street and common highway aforesaid going, returning, passing, and repassing, against the peace, &c.

The prisoner lived as a servant at a house, No. 4 in Albermarle-street, Piccadilly, and on the 31st of July, while several female servants belonging to a club-house were going to bed, about eleven at night, in a room at the back of the house, No. 11 in Stafford-street, the prisoner passed along the roofs of the houses and exposed himself on that of No. 6, Albemarle-street, which was exactly opposite the window of the room where the females were. He was almost entirely naked, and exposed his person.

They mentioned the circumstance to the other servants, but were scarcely credited.

On the following night the prisoner again appeared, and exposed himself in a most indecent manner, remaining on the roof for about ten minutes.

The head waiter of the club was sent for, and also a policeman, both of whom saw the exposure, making, with five females who were present, seven persons before whom, on this occasion, the exposure took place.

The house out of which the prisoner came, as well as that from which the witnesses saw him, were situated in public streets; but that part of the roofs of the different houses along which the prisoner walked did not face the public street, and his acts could not be seen by persons passing along those streets, but they could be seen from the back windows, not only of houses in Albermarle-street and Stafford-street, but also from those of several houses in Bond-street.

The prisoner's counsel submitted that the roofs of the houses did not constitute a public place, and that the exposure, in the presence of the different persons as described, did not amount to a public exposure so as to make the prisoner guilty of the common law misdemeanor.

The case was not argued before me; but it was suggested by the counsel on both sides that it should be reserved for the opinion of the Court of Criminal Appeal, and argued there. I consented to that course, being desirous that the point should be settled by competent authority, and I told the jury that, in my opinion, the place and the exposure were sufficiently public to bring the acts of the prisoner within the law, if they should be of opinion that he exposed himself in fact indecently, wilfully, and intentionally.

The jury found him guilty, and the question for the determination of your Lordships is, whether I was right in so ruling. If I was, the verdict is to stand; otherwise not.

The prisoner, not being able to find bail, is in prison, awaiting the decision of your Lordships.

JOSEPH PAYNE,
Deputy Assistant Judge.

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Best (Besley with him) for the prisoner.—It is submitted that the conviction ought to be quashed. The evidence did not support the averment in the indictment that the exposure occurred "in a certain open and public place." This is an indictment at common law, and the place where the exposure is made must be such as the public have access to. Here the place was not visible to any one passing along the streets. In *Sedley's* case (1 Sid. 16) the exposure was in a balcony in Covent Garden, in sight and view of persons passing along the street. In *Reg. v. Webb* (3 C. Crim. Cas. 183; 1 Den. 338), an exposure to one person in the passage of a public-house leading to the public parlour was held insufficient. And so an urinal in a public market has been held not to be a public place: (*Reg. v. Orchard*, 3 Cox Crim. C. 248.) The exposure must be a public nuisance to render it indictable.

ERLE, C.J.—We are all clearly of opinion that in order to be liable to an indictment for indecently exposing the person it is not necessary that the man should stand and expose himself in a public highway. If it is in a place where a number of Queen's subjects can and do see the exposure, that is sufficient. The rest of the Court concurring.

Conviction affirmed

COURT OF CRIMINAL APPEAL.

November 14, 1863.

ERLE, C.J., WIGHTMAN and WILLIAMS, JJ., MARTIN
and BRAMWELL BB.)

REG. v. RINALDI. (a)

—Photographic impression on glass—Note of foreign country.

making on a glass plate a positive impression of an undertaking for payment of money by a foreign state, by means of photography, without lawful authority or excuse, is a felony within the 24 & 25 Vict. c. 98, s. 19.

It was stated by Keating, J. for the opinion of this Court. Peter Rinaldi was tried before me at the last August session of the Central Criminal Court, upon an indictment framed under the statute 24 & 25 Vict. c. 98, s. 19, which charged that he unlawfully, &c., "make upon a certain plate, to wit, a plate of zinc, an Austrian note for the payment of one gulden. The indictment, which was to be considered a part of the case, contained fourteen counts.

The first was as follows:—

Criminal Court, } The jurors for our Sovereign Lady the Queen
to wit. } upon their oath present that in a certain foreign
state, that is to say, the empire of Austria, for a long time previous to the commission of the felony and offence hereinafter charged, and at the time when the said felony and offence was committed, and since, hitherto to the present time, divers undertakings for the payment of money by the said foreign state, that is to say, the said empire of Austria, were made, issued, negotiated and circulated, and were lawfully current in the said foreign state, and that the said undertakings for the payment of money were, and each of them respectively was, during all the time when they were made, issued, negotiated and circulated, and were current and valid for payment of a certain amount of foreign money, that

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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is to say, for payment of one piece of coin called a gulden, of the currency of the said foreign state, to wit, the empire of Austria, the said piece of coin being lawfully current in the said foreign state, and being during all the time aforesaid, of great value, to wit, each gulden being the value of two shillings in English money, and each of the said undertakings for the payment of money being for the payment of one gulden. And the jurors aforesaid, upon their oath aforesaid, do further present that Peter Rinaldi, late of the city of London, labourer, well knowing the premises, and whilst the said undertakings were so as aforesaid lawfully current in the said foreign state, to wit, the empire of Austria aforesaid, to wit, on the 23rd day of June, A.D. 1863, in the city of London, and within the jurisdiction of the Central Criminal Court, wilfully and feloniously and without the authority of the said foreign state, and without lawful authority and without lawful excuse, did make upon a certain plate, to wit, a plate of glass, an undertaking for payment of money, to wit, for payment of one gulden, purporting to be one of the said undertakings for payment of money of the foreign state aforesaid, to wit, the said empire of Austria, so made, issued, negotiated and circulated, and lawfully current in the said foreign state, as aforesaid against the form of the statute in such case made and provided, and against the peace of our Sovereign Lady the Queen, her crown and dignity.

It was proved that the prisoner employed a photographer to counterfeit Austrian bank notes, his directions being to take the impression of the note on glass by means of the photographic process, and then get it engraved on metal or wood, so as afterwards to strike off the notes when the proper bank-note paper could be procured from the Continent. The photographer accordingly took off on a glass plate a "positive" impression of the note and showed it to the prisoner, who was apprehended whilst approving of the impression and giving further directions with respect to it. It appears that the process of photography consists in exposing to the light a plate of glass properly prepared with collodion, with the note opposite, by which means the shadow or impression of the note is produced upon the glass. This impression is called a "positive," and by converting it into a "negative," which is easily done, notes can either be printed by photography to any extent on properly prepared sensitive paper, or may be engraved from, as directed to be done by the prisoner; but the impression of the note could not be printed or engraved until the positive was converted into a negative. The impression was described by the witness as a mere shadow on the surface of the glass, and easily washed off until fixed; and it was found necessary to varnish the impression taken in order to fix it for production at the trial.

The counsel for the prisoner objected that no offence was proved that the statute did not contemplate the use of photography, but an "engraving or making," by cutting into the surface of some material for the purpose of taking impressions therefrom, thus producing an evanescent shadow of the note upon glass, though intended to be subsequently used for the purpose of engraving.

was not within the statute, and that the engraving of the note, which was ultimately contemplated and directed by the prisoner, never was made.

I thought the case within the statute, and so directed the jury, who found the prisoner guilty, and I respited the judgment for the opinion of the Court of Criminal Appeal.

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Metcalfe for the prisoner.—The procuring of the copy of the note to be photographed in the “positive,” was not engraving or making an undertaking for payment of money within the meaning of sect. 19 of 24 & 25 Vict. c. 98, which enacts that “whosoever, without lawful authority, or excuse (the proof whereof shall lie on the party accused), shall engrave, or in anywise make upon any plate whatsoever, or upon any wood, stone or other material, any bill of exchange, promissory note, undertaking, or order for payment of money or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be, or be intended to be under seal, purporting to be the bill, note, undertaking or order, or part of the bill, note, undertaking, or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of Her Majesty, or shall use or knowingly have in his custody or possession, any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of or put off, or have in his custody or possession, any paper upon which any part of such foreign bill, note, undertaking or order shall be made or printed shall be guilty of felony.” This was a mere shadow on glass, which had to be varnished in order to preserve it for the sake of its being used as evidence in the case. It required another process to be gone through before it could be converted into an “engraving” or “making.” No doubt what was done was an element in the process; but from a “positive” impression you could not engrave a copy of the undertaking. It might have been an overt act, showing that the prisoner intended to engrave, but it was not complete so as to come within this section. *Gambert v. Ball* (32 L. J. 166, C. P.), which decided that photographic copies of an engraving were within the Copyright Acts, has no application to this case.

Poland, for the prosecution, was not called upon.

ERLE, C. J.—I am of opinion that this conviction was right. (His Lordship then read the language of the section.) The prisoner clearly made on a plate of glass an undertaking for the payment of money. An undertaking for the payment of money

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*Forgery by
photography.*

lies in a certain form of words. The process adopted in taking on a plate the positive impression of the note, is to put on a plate the exact words more perfectly than could have been before the discovery of photography. The object of the indictment upon which this indictment is founded is to prevent the counterfeiting of foreign securities. Leaving out of consideration the question of intent, this is a copying of an undertaking to pay a sum of money; and the prisoner does that without authority or excuse. And I am of opinion that the case is within the statute as it is clearly within the intention of the statute. It has been pressed upon us that this photographic impression was merely a preliminary process, and in an evanescent form. But the statute may apply to any stage of the process, and though this photographic copy was in the first stage only, and in the evanescent form, the prisoner was clearly guilty of the offence of counterfeiting within the statute.

The rest of the Court concurring,

Conviction affirmed

COURT OF CRIMINAL APPEAL.

November 21, 1863.

(Before ERLE, C.J., WIGHTMAN, J., WILLIAMS, J.,
MARTIN, B., and KEATING, J.)

REG. v. WILLIAM WHITE WATTS. (a)

positions—Mode of taking—Irregularity—11 & 12 Vict. c. 42, s. 17.

note of the evidence before the committing magistrate, consisting of the witnesses' names and the heads of what each could prove, was taken in the open Court. Then the prisoner and the witnesses were taken into a room, and another clerk examined the witnesses from the note, in the absence of the magistrate, and there wrote down the answers, and the witnesses then signed the paper, and the prisoner was not asked if he would then cross-examine the witnesses; but he did cross-examine them by his attorney in Court. The prisoner and witnesses were then again taken into the Court before the magistrate and the depositions read over to them; the magistrate then asked the prisoner, in the usual way, what he had to say, and signed the depositions.

held, that a deposition so taken was irregular and inadmissible in evidence at the trial.

NASE reserved for the opinion of this Court at the Liverpool Borough Sessions:—

The prisoner was tried before me at a Court of Quarter Sessions of the Peace holden in and for the borough of Liverpool, on the 25th of May, 1863; he was indicted for larceny from his master.

It was proved that one of the witnesses examined before the committing magistrate was unable to attend the trial as a witness on reason of illness.

It was then proposed on behalf of the prosecution to put in evidence his deposition taken before the committing magistrate, and for this purpose a witness was called who proved that the deposition was taken in accordance with the invariable and long-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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—
*Depositions—
Evidence.*

established practice of the Magistrate's Court; that when the prisoner was before the magistrate, he was defended by an attorney, who had a full opportunity of cross-examining, and did cross-examine the witnesses; that a note of the evidence given before the committing magistrate, consisting of the names of the witnesses and the heads of what each could prove, was taken by clerk to the magistrates; that afterwards the prisoner and the witnesses were taken into a room, and that there another clerk, who had not been present at the examination before the magistrates, examined the witnesses from the aforesaid note in the absence of the magistrate, and there wrote down the answers, and that the witnesses then signed the paper so written by the said last-mentioned clerk; that the prisoner's attorney was not there, though he might have been if he had liked, and that the prisoner was not asked if he would then cross-examine the witnesses, and did not cross-examine them.

That afterwards the prisoner and the witnesses were again taken before the magistrate, and the evidence so taken and written down by the clerk in the room, in the absence of the magistrate, was read over to them; that the prisoner was not then asked if he would cross-examine the witnesses; that his attorney was not there, though he might have been if he had liked; that the magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate then signed the papers so written as last aforesaid; that one of the depositions contained in the said last-mentioned paper was the deposition tendered in evidence before me.

It was objected on behalf of the prisoner that such deposition was not taken in accordance with 11 & 12 Vict. c. 42, s. 17, and was therefore inadmissible; and the following authorities were cited: *Reg. v. Arnold* (8 C. & P. 622); *Reg. v. Johnson* (2 C. & K. 394); *Reg. v. Christopher* (1 Den. C. C. 536; 4 Cox Crim. Cas. 76); *Caudle v. Seymour* (1 Q. B. 889).

I admitted the deposition, and the prisoner was convicted; but having doubts as to its admissibility, I granted this case for the opinion of your Lordships, whether the said deposition so taken was properly admitted.

I respited judgment and the prisoner was admitted to bail.

LEOFRIC TEMPLE,

Assistant Barrister to the Recorder of Liverpool,
27th May, 1863.

Little, for the prisoner.—The depositions were inadmissible. They were not taken in accordance with 11 & 12 Vict. c. 42, s. 17. The legislation in respect of the deposition of witnesses is narrated in 2 Russ. on Crimes, 889. In 1 Taylor on Evidence, ss. 452 *et seq.*, referring to *Reg. v. Potter* (7 C. & P. 650); and *Reg. v. Thomas* (*Ib.* 817), it is stated that it was the intention of the Act that the magistrate should be present when the depositions of the witnesses are taken. [MARTIN, B.—The question is whether this

deposition was taken in compliance with the Act.] It is not stated in the case, but it is the practice at Liverpool for several clerks to be employed at the same time in taking the depositions of witnesses in different cases when the magistrate is not present. The clerk may add or omit questions. Virtually he exercises the power intended to be exercised by the magistrate. [MARTIN, B.—My brother Willes mentioned to me that the same objection as that taken here was made before him at Liverpool, and that he understood that it was the universal practice. I have always been surprised at the great difference in the length of the cross-examination of witnesses when before justices and before judges, but I can now understand how it is that in the former case the cross-examination extends only to a line or two.] In the schedule to 11 & 12 Vict. c. 42, the depositions are stated to be "taken and sworn before me," *i. e.*, before the magistrate. The evidence which was taken before the magistrate is not returned, and that which was not taken before him is returned. In *Christopher's* case a magistrate's clerk at his own office drew up depositions from minutes taken before a magistrate and questions asked by him, and it was held that a witness in cross-examination might be asked what he had then said to the magistrate's clerk without putting in the depositions which had been afterwards read over in the presence of the prisoner and witnessed before the magistrate. The reasoning also in *Caudle v. Seymour* (1 Q. B. 889), applies.

James, Q. C., for the prosecution, said that he appeared to hear the judgment of the Court, and not to argue in support of the prevailing practice. The prosecutors were desirous that the Court should lay down a rule for the guidance of the magistrates of Liverpool on future occasions. His own mind was opposed to the practice, and he would not argue in support of what he did not approve. If the Court did not sanction the practice the Corporation would put themselves in position to have further assistance for the discharge of the magisterial duties. The learned Assistant-Barrister was of opinion that the depositions were inadmissible, but reserved the case in order that the question might be raised and settled. No blame attached to the magistrates. [WIGHTMAN, J.—The officer of this Court informs us that the practice in London and the Metropolitan Police Courts is to take the depositions in the presence of the magistrate. MARTIN, B.—I do not think it would be considered essential for the magistrate himself to write down the answers.]

ERLE, C.J.—I think that the depositions were inadmissible, not having been properly taken. The statute requires the depositions to be taken down in writing in presence of the magistrate and of the prisoner, and that the prisoner shall be at liberty to cross-examine the witnesses in the presence of the magistrates. In this case those requirements have not been complied with. It is not our province to lay down any regulations as to the particular way in which depositions should be taken, but to decide the

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question before us, and all that we now say is, that the depositions were improperly taken. The conviction therefore will be quashed.

The rest of the Court concurring,

*Depositions—
Evidence.*

Conviction quashed.

COURT OF CRIMINAL APPEAL.

November 21, 1863.

(Before ERLE, C.J., WIGHTMAN, and WILLIAMS, JJ., MARTIN, and KEATING, J.)

REG. v. G. H. BREN. (a)

Embezzlement—Clerk or servant—Friendly Society—Committeeman

Two friendly societies appointed a committee, of which the defendant was a member, to conduct an excursion; the committee employed defendant and several others to sell tickets. It was his duty to receive over the money so received (which was to belong to the two societies) a person appointed by the committee, but he received no remuneration for his services:

Held, that he was a joint owner of the money, and not a clerk or servant within the 24 & 25 Vict. c. 96, s. 68, liable to be indicted for embezzlement.

THIS case was reserved for the opinion of this Court, by the Deputy-Recorder of Reading at the Borough Sessions.

George Holgate Bren was charged that he, being employed as servant to D. L. (naming the other members of the committee), did whilst he was so employed receive and take into his possession 24s. for and in the name and on the account of the said D. L., &c., his masters, and the said money did fraudulently and feloniously embezzle.

The persons above-named, with the said George Holgate Bren, were a committee formed from the members of two friendly

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

societies, called the Excelesior and the Royal Berkshire Lodges, for the purpose of conducting an excursion by the South-Eastern Railway.

The said committee nominated certain persons to sell tickets, entitling the bearers to share in the excursion, and issued to them the tickets for sale. The tickets and the money produced by the sale of them belonged to the two friendly societies; each lodge being entitled in proportion to the number of its members. The duty of the persons appointed to sell tickets was to pay over the money received from the sale of them to a person appointed by the committee to receive it for the use of the societies. They received no remuneration for their services.

The said George Holgate Bren was a member of the Royal Berkshire Lodge, and one of the persons nominated by the committee to sell tickets. A certain number of tickets were issued to him for sale, which he sold, and instead of paying over the money to the persons appointed by the committee he fraudulently appropriated it.

The case was tried before me, acting as Deputy to the Recorder for the Borough of Reading, on Tuesday, the 27th Oct.

The jury found that the said George Holgate Bren was employed by the committee; that while so employed he received the money mentioned in the indictment in the name and on the account of the committee, and fraudulently converted it to his use.

Whereupon I directed a verdict of guilty, subject to the opinion of this Court, whether he was employed "for the purpose, or in the capacity of a clerk or servant," within the meaning of the 68th section of 24 & 25 Vict. c. 96, and whether being a member of the committee and of one of the societies, and thus a joint owner of the tickets, and the money produced by the sale of them, he could be lawfully convicted.

Judgment has been postponed, and the prisoner discharged on recognizance of bail to appear and receive judgment.

Reading, Oct. 29, 1863.

T. BROS.

Pater for the defendant.—The conviction cannot be sustained. The defendant was a mere trustee, and was not employed as a clerk, or in the capacity of a clerk. He received no remuneration, and was not under the control of any one. In *Reg. v. May* (1 L. & C. 13; 8 Cox Crim. Cas. 421), a person who was to be allowed commission on all business that he did for the prosecutors, and who was to account to them for any money he might receive, immediately on the receipt of it, was held not to be a clerk or servant within the 7 & 8 Geo. 4, c. 29, s. 47. In that case, Cockburn, C. J., said, that the relation of clerk or servant implied control. Here the defendant was subject to none.

MARTIN, B.—The prisoner was more like a managing partner than anything else.

Harington for the prosecution.—Although the defendant was a

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member of the committee and jointly interested in the fund, yet according to *Reg. v. Proud* (9 Cox Crim. Cas. 22), and *Reg. v. Burgess* (9 Cox Crim. Cas. 302), he was liable to be convicted for the embezzlement.

MARTIN, B.—In *Proud's* case the prisoner was a paid secretary, and, as such, under a contract to receive and pay over the money, and until he had paid it over he held it on behalf of his employers.

Harington.—In *Burgess's* case the prisoner was a member of the society, and was held liable to be convicted of larceny for taking money belonging to the society.

MARTIN, B.—A shareholder in a joint-stock bank has no interest in the money in the bank, only in the net profits.

ERLE, C.J.—We are all of opinion that the conviction cannot be sustained. The defendant was a member of the committee, and so a joint owner of the money. And we think that he was not chargeable as a clerk or servant, and so not liable upon this indictment.

MARTIN, B.—I also think that the defendant was neither a clerk or servant, nor employed in the capacity of a clerk or servant.

The rest of the Court concurring,

Conviction quashed.

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APPENDIX.

STATUTES.

*An Act to amend the Law relating to Marriages in Ireland**An Act to amend and continue the Law relating to Corrupt Practices at
Elections of Members of Parliament**An Act for the further Security of the Persons of Her Majesty's Subjects from
personal Violence**An Act for the Amendment of the Law relating to the Religious Instruction
of Prisoners in County and Borough Prisons in England and Scotland ...*

FORM OF INDICTMENT.

Indictment, under the Foreign Enlistment Act, charging a subject of the
 Queen with attempting to enlist in the service of a foreign power other
 British subjects, without having obtained the leave or licence of the
 Queen 1r

Ireland.

COURT OF QUEEN'S BENCH.

June 8 and 9, 1863.

REG. v. JOHN REA. (a)

*il information—Plea of justification to counts for words
en—Setting aside plea on motion—Stat. 6 & 7 Vict. c. 96.*

*urt refused to set aside on motion a plea of justification pleaded
nts of a criminal information for words spoken of and to a
n acting magisterially, leaving the party to demur if he thought*

It was a motion on behalf of the prosecutor to have the special plea filed by the defendant to counts 1 to 13 of the information taken off the file. The case was one of a criminal information. The information contained nineteen counts. The first eight counts were for words spoken to and of the prosecutor in the execution of his office of Mayor of Belfast residing at a meeting of the town council, and with intent to bring the prosecutor into contempt in the execution of his office and to bring his office into contempt; the ninth, tenth, eleventh, and twelfth for words spoken with the same intent of the prosecutor while acting in the execution of the duties of his office; the thirteenth, fourteenth, fifteenth, and sixteenth for words spoken of the prosecutor while presiding as mayor, with intent to insult him in the execution of the duties of his office, and to provoke him to a breach of the peace; and the seventh, eighteenth, and nineteenth for composing and publishing a libel of the prosecutor as mayor, and of and concerning him in the execution of the duties of his office. The prosecutor pleaded, 1st,—To the whole information "not guilty." 2nd,—To counts 1 to 13 a justification, that the words spoken were true, that it was for the public benefit that they should be spoken, and that it was the duty of the traverser as a town

(a) We are indebted to *The Irish Jurist* for a report of this case.

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councillor of Belfast, to speak them. 3rd,—To the eig
nineteenth, and twentieth counts (a), that the matters comp
published were true, that it was for the public benefit t
should be composed and published, and that it was the
the traverser as such town councillor to compose and
them.

Joy, Q.C. (with him *Brewster*, Q.C., *Harrison*, Q.C., and
for the prosecutor. The pleas which we complain of
Lord Campbell's Act, 6 & 7 Vict. c. 96, does not appl
case. [*HAYES*, J.—Is there any jurisdiction in this Court to
on motion pleas as embarrassing, or false, or sham in
cases? It was considered a bold measure to give that i
civil matters; and I do not remember any case of setting
striking out pleas in criminal cases.] There can be no diffic
jurisdiction if you consider this plea an abuse. Then,
traverser is an attorney, an officer of the court. Suppos
the statute of Anne giving liberty to plead double in civi
party had taken on himself in a civil case to plead doubl
not the Court have set the second plea aside? Then these
badly pleaded. The Act of Parliament requires a plea
cation in a criminal case to be pleaded exactly as in civ
(*Hayes's Crim. Law*, 754; stat. 6 & 7 Vict. c. 96, s. 6; *Bar
Thompson*, 8 Sc. 34.) In mandamus cases, if an inprop
filed, a motion may be made to take it off the file: (*Ta
Mandamus*, 386.)

M'Donogh, Q.C. and *M'Mahon* for the traverser.—The
of defences in civil cases does not apply. They are the s
specific rules; and before those rules were made even sh
would not have been taken off the file: (*Smith v. .
4 Bing. 512; Merrington v. Peckett*, 2 B. & Cr. 81; *I
v. Langan*, 4 Dowl. 642; *Hourigan v. O'Grady*, 13 Ir. L
230.) *Hayes's Crim. Law*, p. 754, has no bearing on t
The cases cited in *Tapping on Mandamus* are in our fa
the plea is defective the prosecutor should demur: (1 C
Law, 477, 2nd edit.; *Rex v. Sutton*, 1st Wms. Sar
The application is not warranted by authority, nor sanct
principle or reason. The counts of the information to v
plea is pleaded are bad: (*Archbold Cr. Law*, 10th ed
Reg. v. Langley, 6 Mod. 125; *Rex v. The Duke of Man
New Sessions Cases*, 195, s. c. 5 Q. B. 958; *Ex parte
4 Ad. & Ell. 773.*) If they demur to our plea we can
on their bad counts. Lord Campbell's Act does apply t
oral slander: (*Bayley v. Laurence*, 11 Ad. & Ell. 921;
Hardy, 8 Ir. C. L. Rep. 452; stat. 32 Geo. 3, c. 60.)

Brewster, Q.C., in reply. Before the statute 6 & 7 V
no one could plead a justification to an information of th
all; and since the statute there is no precedent of a ple
been pleaded that the words charged as spoken were tru

being so a statute was passed; and if that statute applied to the case of words spoken, a question might arise whether in this case they were entitled to plead such a plea; and that involves two considerations; 1st, is this an information for words spoken? and 2ndly, if it is, is that a case within the statute? I say that this is an information for obstructing a magistrate in the execution of his duty. [LEFROY, C.J.—Let it be ever so clear that the statute does not apply, are we to decide that upon a summary motion of this kind, there being no appeal from our decision, or should not the question be brought on by demurrer? O'BRIEN, J.—If the case is so clear that the plea is bad, you will get judgment on demurrer.]

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Motion refused, but without costs.

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WESTMEATH SUMMER ASSIZES, 1863.

(Before the LORD CHIEF BARON.)

REG. v. BODKIN. (a)

Evidence—Statement by prisoner.

Answer by prisoner, after his arrest, to a question asked by police constable inadmissible.

W. R., a police constable, arrested the prisoner, and having given the usual and proper caution, proceeded to search his house; having found the prisoner's coat, which was wet from washing, the constable asked the prisoner why he had washed his coat?

Battersby, Q.C., for the prosecution, proposed to give in evidence the prisoner's answer to this question.

Curran and *Molloy*, for the prisoner, objected.

The CHIEF BARON ruled that the answer could not be given in evidence, and said that where a constable arrests a party he ought to abstain from asking questions; he ought to leave that duty to the magistrate, who alone has the power to reduce to writing what is said by the prisoner.

(a) Reported by CONSTANTINE MOLLOY, Esq., Barrister-at-Law.—(From the *Irish Jurist*, by permission).

Ireland.

WESTMEATH SUMMER ASSIZES, 1863.

(Before the LORD CHIEF BARON.)

REG. v. BODKIN. (a)

Practice—Counsel.

Counsel is not to state in his address to jury statements made by prisoner after his arrest.

BATTERSBY, Q.C., in his opening address for the prosecution, was about to state to the jury the particulars of certain statements which the prisoner had made to police constables and magistrate after his arrest.

Curran and Molloy, for the prisoner, objected, and said it had always been held not proper for counsel to state to the jury in his opening address admissions made by the prisoner, inasmuch as they are frequently afterwards rejected as inadmissible.

The CHIEF BARON said that in the course of his experience as Crown prosecutor he had never known such statements to be introduced into the addresses of counsel opening the case for the Crown; and that even if it were necessary now to create a precedent, he would make one, and rule that they should not be stated.

(a) Reported by CONSTANTINE MOLLOY, Esq., Barrister-at-Law.—(From the *Irish Jurist* by permission).

COURT OF CRIMINAL APPEAL.

November 22, 1862, and November 24, 1863.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ.,
CHANNELL, B., and MELLOR, J.)

REG. v. SAMUEL STANNARD. (a)

Brothel-keeping—Landlord—Weekly tenants.

The landlord was indicted for keeping and maintaining, in the first count, a common bawdy-house, and, in the second, a disorderly house. It was proved that the house was let out in apartments to young women by distinct takings as weekly tenants, but the landlord did not occupy any part, nor keep the key, nor reserve to himself any right of entry. The tenants occupied the house as a brothel and so as to cause it to be a scandal to the neighbourhood. The only profit the landlord derived was an increased rent. Complaints were made to the landlord, and he well knew the uses to which the apartments were applied by his tenants, but he took no steps to remove the lodgers:

Held, upon these facts, that the landlord did not "keep or maintain" a bawdy-house or a disorderly house.

CASE reserved by Cockburn, C.J., for the opinion of this Court.

Samuel Stannard was tried before me at the last Assizes for the County of Suffolk, upon the following indictments:—

Suffolk, } The jurors for our Lady the Queen, upon their oath present,
to wit. } that Samuel Stannard, on the first day of January, in the
year of our Lord One thousand eight hundred and fifty-nine, and on
divers other days and times between that day and the day of taking this
inquisition, at the parish of St. Mary Key, in the borough of Ipswich, in
the county aforesaid, unlawfully did keep and maintain a certain common
bawdy-house, and in the said house, for the lucre and gain of him the said
Samuel Stannard, certain persons, as well men as women, of evil name
and fame, then and there, and on the said other days and times, there
unlawfully and wilfully did cause and procure to frequent and come together
the said men and women and whores in the said house of the said Samuel

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Stannard, at unlawful times, as well in the night as in the day, the there and on the said other days and times there to be and re drinking, tippling, whoring and otherwise misbehaving themselves lawfully and wilfully did permit, and yet doth permit, to the damage and common nuisance of all the liege subjects of our said the Queen there inhabiting, being, residing and passing, to the example of all others in the like case offending, and against the of our said Lady the Queen, Her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further pr that the said Samuel Stannard, to wit on the said first day of Jan in the year aforesaid, and on the said other days and times aforesai the said parish of St. Mary Key, in the borough aforesaid, in the c aforesaid, unlawfully did keep and maintain a certain commo governed and disorderly house, and in the said last-mentioned house, f lucre and gain of him the said Samuel Stannard, certain persons, a men and women, of evil name and fame, and of dishonest conversa then and there and on the said other days and times, there unlav and wilfully did cause and procure to frequent and come together the said men and women, in the said house of him the said St Stannard, at unlawful times, as well in the night as in the day, the there and on the said other days and times, there to be and re drinking, tippling, whoring and otherwise misbehaving themselves lawfully and wilfully did permit, to the great damage and cor nuisance of all the liege subjects of our Lady the Queen there inhab being, residing and passing, to the evil example of all others i like case offending, and against the peace of our said Lady the Q Her Crown and dignity.

The facts proved were as follows:—

The house in question was inhabited entirely by women, lived by prostitution openly carried on, and whose conduct often riotous and grossly indecent, so as to be a scandal and of to the neighbourhood.

The defendant was the owner of the house, but he occupie part of it, neither did he keep the key, or reserve to himself right of entry. The apartments throughout the house were l weekly tenants, who occupied separately under distinct tak each lodger having her own room, her own key, and a door c ing either into the street or into a passage communicating the street.

The defendant had nothing whatever to do with the man ment of the house (if indeed a house thus divided into distinc separate holdings could be said to be managed as a house) any part of it.

He received no share of the earnings of the women, nor di derive any benefit therefrom, except so far as he may be s have done so incidentally from their ability to pay their rent l thereby increased.

He had no control over the tenants, except such as might indirectly from his power as landlord to determine the ter from one week to another. He only went to the house to c the weekly rent from the different lodgers, or when being pr

by the complaints of the neighbours, he went (as sometimes happened) to endeavour to prevail on the inmates to be more orderly in their behaviour.

On the other hand, it was abundantly clear that he perfectly well knew the use to which the apartments were applied by the several lodgers, and that he let the apartments with a full knowledge that they would be applied to the purposes of prostitution and with a perfect assent on his part to their being so applied.

A question presented itself whether, under these circumstances, the defendant could be considered as having "kept" the house in the legal sense of that term.

Entertaining serious doubt how far the indictment could, on the state of facts I have stated, be supported, I thought it best, on the whole, to direct a verdict of Guilty, reserving the case for the consideration of this Court.

COCKBURN.

No counsel appeared for the prisoner.

November 22, 1862.—*Metcalfe* (Orridge with him), for the prosecution.—It is submitted that the conviction was right. The 5 Geo. 3, c. 36, s. 8, defines who shall be deemed to be the keeper of a bawdy-house, "And whereas by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, and other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment, be it enacted, that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof." [POLLOCK, C.B.—What did the landlord do here as master or mistress?] He let it out to young women, and so made himself responsible for the nuisance. The depositing of naptha in large quantities in a warehouse has been held to be indictable as a nuisance: (*Reg. v. Lister*, 7 Cox Crim. Cas. 342.) So, in *Reg. v. Moore* (3 B. & Ad. 184), the defendant was held indictable for keeping a pigeon shooting-ground, and thereby causing persons to come upon the highway adjoining with guns to shoot the stray pigeons. So, here, the landlord may be said to bring these young women together, knowing their way of life and to what uses in all probability the apartments will be applied. [POLLOCK, C.B.—No doubt the lodgers were each liable for keeping a bawdy-house (*Pierson's case*, 2 Lord Raym. 1197); but in what sense does the landlord keep the house so as to make him liable?] He knew the uses to which the house was to be applied, and so was an accessory before the fact; and under 24 & 25 Vict. c. 94, s. 8, was liable to be indicted as a principal offender. He had the

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power of determining the tenancies, and neglecting to do so was aiding and abetting the lodgers in so using the house. In *Rex v. Pedley* (1 A. & E. 822), it was held that the landlord of premises let out on short tenancies was liable for a nuisance arising during the tenancy, that being the consequence of the nature of the erection. So here, the nuisance arises from letting the rooms to these young women with full knowledge of their way of life. In *Thompson v. Gibson* (7 M. & W. 456), the defendants were held liable for continuing a nuisance from a building erected under their superintendence, although they had no right to enter upon the land to remove it. The cases of *Rex v. Medley* (6 C. & P. 292), and *Rich v. Basterfield* (4 C. B. 783), were also referred to.

Cur. adv. vult.

No counsel appeared for the prisoner.

November 24, 1863.—POLLOCK, C.B.—In this case the facts were, that the prisoner, being owner of a house, had let out the whole of it in different apartments to young women whose habits were not of the most moral kind. The prisoner retained no part of the house, and had no control over any part of it whatever. No doubt the persons to whom it was let, and who used it for immoral purposes, were themselves indictable. The prisoner, however, was indicted for keeping a disorderly house, and we are of opinion that, whatever other offence he may have been guilty of, he was not guilty of the crime of keeping a disorderly house. He did not keep the house, nor was any part of it kept by him. He had no right to let any one in or refuse admission to any one during the tenancy. We are, therefore, of opinion that the house was not kept by him, and that the conviction ought to be quashed.

Conviction quashed.

CENTRAL CRIMINAL COURT.

January 7, 1863.

(Before Mr. Justice BLACKBURN.)

REG. v. BREWER and OTHERS. (a)

Evidence—Practice—Deposition.

*position of the witness was placed in his hands by prisoner's
self, and he was asked if, after looking at it, he adhered to an
er just given.*

*hat the deposition could not be so used unless it was formally
the prisoner's evidence.*

*Two prisoners were indicted for feloniously forging and
uttering a 5l. note, purporting to be a note of the Governor
and Company of the Bank of England, with intent to
defraud.*

*Fitzroy Kelly, Q.C., Bovill, Q.C., Hardinge Giffard, and
Ballantine, Serjt., for the prosecution.*

*Ballantine, Serjt., D. D. Keane, and F. H. Lewis for the
prisoner, Brewer.*

*George Smith, one of the witnesses for the prosecution, was
examined by Ballantine, Serjt., and during the cross-
examination—*

Ballantine, Serjt., to the witness:—"Is this your signature?"
He picked up the deposition of the witness taken before the magis-

trate.—This is my signature.

*Ballantine, Serjt.—I now propose to put the deposition into
the witness's hands, and that he should read it through, and,
if he has done so, I propose to ask him if he adheres to an answer
just given.*

*Fitzroy Kelly.—I object to such a course. The witness has
a circumstance that occurred, and it is sought to refresh his
memory by putting into his hands a memorandum or document
made at the time. The deposition is evidence as to what he
said at another time, and, if used, must be formally put in as
the prisoner's evidence.*

(a) Reported by ROBERT ORRIDGE, Esq., Barrister-at-Law.

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Ballantine, Serjt.—I do not intend him to use it for the purpose of refreshing his memory. It may be he has said one thing to-day and another formerly, and, if so, I would ask him if he adheres to what he has said to-day. In *Rex v. Edwards* (8 Car. & Payne, 26), "it was proposed on the part of the prisoner to put the depositions into the hands of a witness, and desire him to look at his own, and refresh his memory by it, and then to ask him whether, after having so done, he would adhere to the statement he had just made;" and the Judges presiding, Littledale and Coleridge, J.J., allowed it to be done.

Sir Fitzroy Kelly.—That was shortly after the passing of the "Prisoner's Counsel Act," and before the Judges had met to consider the rules. A similar question was raised in *Reg. v. Ford* (2 Den. C. C. 245), and Lord Campbell, C.J., said, the proper course was to read the deposition at the trial, and then to cross-examine upon it, or to put it in afterwards as the evidence for the party so putting it in.

BLACKBURN, J.—If the deposition be used for the prisoner it must be put in in the regular way.

Ballantine, Serjt.—I will not press the point any further.

Not Guilty.

NOTE.—In *Reg. v. Ford*, Alderson, B., said—"The contrary course might open the door to a very tricky practice. For instance, suppose the witness to have made precisely the same statement in Court with that contained in his deposition, and the counsel to put the deposition into his hand, and to ask him whether he still persisted in the statement which he had just made in Court; and the witness to do so: in that case the jury would naturally conclude that the statement and the deposition materially differed, and, unless the deposition was read in Court, they would remain under that false impression, and give their verdict under a complete misconception of the facts." The rest of the Court, Platt, B., Coleridge, and Talfourd, J.J., concurred.

NORTHERN CIRCUIT.

LIVERPOOL WINTER ASSIZES.

December 9, 1863.

(Before Mr. Justice WILLES.)

REG. v. MOONEY. (a)

*Evidence—Depositions before Coroner.**Depositions taken before the Coroner of a witness too ill to attend may be sent before the Grand Jury.*

THE prisoner was charged with manslaughter of her daughter's illegitimate infant child on a Coroner's inquisition. No depositions had been taken before a magistrate, but the coroner had duly transmitted the depositions taken before him.

Preston, for the prosecution, applied to the Court for permission to send the depositions of a witness who was examined before the coroner, but who was now too ill to attend and give evidence, to be laid before the grand jury.

WILLES, J., said, that depositions taken before a coroner were not governed by the stat. 11 & 12 Vict. c. 42, s. 17, and that therefore he must consider how the question stood at Common Law.

Preston quoted *Reg. v. Hazell* (8 Cox. Crim. Cas. 443).

WILLES, J., took time to consider.

On the following Monday his Lordship caused the prisoner to be placed at the bar, and told her of the application which had been made, and asked her if she had any objection to her trial being postponed.

The prisoner said she had.

WILLES, J., said, that under the circumstances he would allow the depositions to be read before the grand jury, and if she should be tried and convicted he would consult WILLIAMS, J., who was trying causes, and if necessary he would

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state a case for the Court of Crown Cases Reserved, as it was very desirable that the point should be settled, and that if all depositions before coroners were as well taken as these were, there could be practically no objection to admitting them, if it were legal to do so.

The depositions were accordingly sent before the Grand Jury, who, however, cut the bill.

COURT OF QUEEN'S BENCH.

January 16, 1864.

(Before COCKBURN, C.J., CROMPTON, BLACKBURN, and MELLOR, JJ.)

REG. v. HAGUE. (a)

Personation of Voters—Inducing another to personate—Municipal election—Evidence—Conviction.

The offence of inducing another to personate a voter at a municipal election under 22 Vict. c. 35, s. 9, is complete upon the personator tendering the voting paper, although, on being asked if he is the person whose name is signed to the voting paper, he answers "No," and the vote is accordingly rejected.

A conviction for such offence need not set out the facts constituting the offence.

CASE stated by the Quarter Sessions of the West Riding of Yorkshire, upon an appeal, wherein a conviction by Justices of one Thomas Hague, under sect. 9 of 22 Vict. c. 35, for inducing one James Fogle to personate a voter at an election of town councillors, was affirmed.

(a) Reported by JOHN THOMPSON Esq., Barrister-at-Law.

On the 5th Nov. 1862, Thomas Hague was summarily convicted, under 22 Vict. c. 35, s. 9, for unlawfully and knowingly inducing one James Fogle to personate one George Bamford, then being a burgess of the borough of Sheffield, then entitled to vote at the election of councillors for St. Philip's Ward, in the said borough, on the 1st Nov. 1862, as by the annexed conviction appears.

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By the 9th section of the said Act it is enacted that if, pending any election of councillors, any person shall personate, or induce any other person to personate, any person entitled to vote at such election, or whose name is on the burgess-roll then in force, or falsely assume to act in the name or on behalf of any person so entitled to vote, &c., he shall be liable to be convicted and punished as therein mentioned.

On the 1st Nov. 1862, pending the annual election of councillors, the said Thomas Hague gave a nomination paper (a copy of which is annexed), signed by one George Bamford, to the said James Fogle, at a public-house in Sheffield, and asked him to take it to the schoolroom, Bowling-green-street, to vote. Fogle looked at the paper, and said it was not his name that was on it. Hague told him to vote for Wood and Trickett, and said he was to take the paper and put it down before a gentleman he would see sitting, and that they would not say anything to him. Fogle asked Hague if he would get into any trouble; to which Hague said, "Oh no; there was one man voted eight times in an hour at the previous election." James Fogle after this took the said nomination-paper to the said schoolroom and put it into the hands of one John George Robson, the presiding officer there for the reception of votes for the said ward. The said John George Robson thereupon, being so required, asked the said James Fogle the following question: "Are you the person whose name is signed as George Bamford to the voting-paper now delivered in by you?" To this question the said James Fogle answered "No."

The name of George Bamford was at the time on the burgess-roll then in force. The voting-paper was not filed, nor was the vote of George Bamford recorded in the said election in consequence of the paper being so handed to the said John George Robson by the said James Fogle.

Against this summary conviction the said Thomas Hague appealed to the Court of Quarter Sessions holden for the West Riding of Yorkshire, at Sheffield, on the 9th Jan. 1863; and at the hearing of the said appeal contended that, on the above-stated facts, the offence within the meaning of the said statute whereof he had been convicted, had not been committed by him, inasmuch as Fogle did not actually vote, nor was the vote of George Bamford recorded at the said election, nor had Fogle represented himself to be the person whose name was on the voting-paper as entitled to vote, nor had the said offence been duly and sufficiently set forth, as no particular act of inducing had been specified in the conviction.

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The said Court of Quarter Sessions confirmed the conviction subject to a case for the decision of the Court of Queen's Bench, whether the said Thomas Hague had, under the above facts, committed the alleged offence, within the meaning of the said statute, of inducing James Fogle to personate the said George Bamford pending the said election, and whether the offence of inducing was duly and sufficiently set forth in and by the said conviction.

If the Court of Queen's Bench are of opinion either that the said Thomas Hague did not commit the offence within the meaning of the said statute of which he is convicted, or that such offence is insufficiently set forth in the said conviction for the reason aforesaid, then the decision of the said Court of Quarter Sessions, confirming the said conviction, and the said conviction, are to be quashed; but if the Court of Queen's Bench are of opinion that the said Thomas Hague did commit the offence within the meaning of the said statute of which he was convicted, and that the said offence of inducing James Fogle to personate the said George Bamford is duly and sufficiently set forth in the said conviction, then the said decision of the Court of Quarter Sessions, and the said conviction, are to be confirmed.

The conviction was as follows:—

“Borough of Sheffield in the West Riding of Yorkshire, to wit—Be it remembered that on the 5th day of Nov. 1862, at the parish of Sheffield in the borough of Sheffield, in the West Riding of the county of York, Thomas Hague, of the parish and borough aforesaid, in the said West Riding, labourer, is convicted before us the undersigned John Brown, Esq., mayor of the said borough, and Thomas Dunn, Esq., two of Her Majesty's Justices of the peace in and for the said borough of Sheffield; for that he the said Thomas Hague within the space of six calendar months next before the laying of the information whereon this conviction is founded, to wit, on the 1st day of November in the year aforesaid, in the West Riding aforesaid, pending a certain election of councillors for St. Philip's ward in the said borough, unlawfully and knowingly did induce one James Fogle to personate one George Bamford, then being a burgess of the said borough then entitled to vote at the said election, against the form of the statute in such case made and provided. And we adjudge the said Thomas Hague for his said offence to be imprisoned in the house of correction at Wakefield in the West Riding for the space of two months. Given under our hands and seals the day and year first above-mentioned, at the parish and borough aforesaid in the West Riding aforesaid.

“JOHN BROWN (L.S.), Mayor.

“THOMAS DUNN (L.S.)”

The conviction then set out the form of the voting-paper, purporting to be signed by George Bamford, of 97, Allen-street.

By sect. 9 of the 22 Vict. c. 35 (An Act to Amend the Laws relating to Municipal Elections), it is enacted that, “If pending

or after any election of councillors, auditors, or assessors, any person shall personate or induce any other person to personate any person entitled to vote at such election, or whose name is on the burgh-roll then in force, or falsely assume to act in the name or on behalf of any person so entitled to vote, or wilfully make a false answer to any of the questions mentioned in sect. 18 of this Act, he shall for every such offence be liable, on conviction before two justices in petty sessions, to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour."

Fowler appeared in support of the order of Sessions and the conviction, but the Court called upon

Maule, for the appellant, who argued, first, that as *Fogle* did not vote, and upon the question being put to him declared at once that he was not *George Bamford*, he had committed no offence, and that *Hague* consequently could not be guilty of inducing him to commit it. [COCKBURN, C.J.—The question is, whether, because a trick fails, it is less a personation.] The 6 & 6 Will, 4, c. 76, s. 32, describes the mode of voting, and by sect. 34 the questions can only be asked upon the requisition of two burgesses. [COCKBURN, C.J.—If these questions are not asked, the fact of personation is complete by handing in the voting-paper. [BLACKBURN, J.—Surely, if by words or signs he represents himself to be the person, it is a personation.] The question is, did the inducer succeed in making *Fogle* pass off as another person? [COCKBURN, C.J.—Or rather, did he succeed in inducing him to go and endeavour to vote as another person? Is a man less guilty of uttering a forged note because he is stopped before it actually changes hands?] There the offence is complete by tendering the note. [COCKBURN, C.J.—So is it here by his tendering himself as another person.] It is a distinct offence to make a false answer. Secondly, the conviction is bad for not setting out the facts constituting the inducement. [In *R. v. Marsh* (6 A. & E. 250), the indictment for a similar offence set out all the facts. [MELLOR, J.—There are certainly cases in which a general allegation is not sufficient, as where the act charged does not show what was really done; but here it is obvious.] The inducement certainly is set out, but not the means of inducement. The word "induce" may mean anything.

COCKBURN, C.J.—I am of opinion that the order of Sessions should be confirmed. Whatever doubt may have existed as to whether or not the offence has been committed, if the charge had been upon the second branch of the section, for making a false answer, yet there can be no doubt as to the first branch, which makes it an offence to personate, or to induce another to personate a voter; and I cannot but think that if a man goes up to the voting-place and represents himself as another person, it is a false personation. The giving of a false answer to the questions would be of itself an offence, but that is an additional offence. I think it is not because his attempt was frustrated that he was not

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guilty of the offence. It was not because he would not give a false answer that he has not falsely personated another. His offence was equally grave whether he succeeded or not. As, therefore, Fogle actually falsely personated, the defendant was guilty of inducing him to personate.

CROMPTON, J.—I am of the same opinion. Mr. Maule argues that, to constitute the offence of inducing a person to personate, it is necessary that he should have successfully personated, and that as the personation was not successful, therefore he was not guilty. I am certainly inclined to think that if the party did not in fact personate another, the defendant cannot be guilty of inducing him to personate; but here there is an actual personation. I take it that the meaning of the section is—pretend to personate. Now here the party gives in a voting-paper, and so represents himself to be another person. I do not think that his refusal to tell falsehood purges his offence. As regards the second objection there is no authority for saying that you must set out the particular facts. In the old convictions it was certainly necessary to set out the evidence, that the court might see that the party has been convicted upon legal evidence, but this is not necessary at the present day.

BLACKBURN, J.—I am of the same opinion. I take it that, as soon as the man holds himself out to be the person entitled to vote, and does so in the name of another, he commits the offence; and that it is utterly immaterial that he is stopped before he succeeds in his object. Upon his tendering his voting-paper, he has done sufficient to warrant the conclusion that he personated.

MELLOR, J.—I think that when a man presents a voting-paper to the person whose duty it is to take the votes, the personation is complete, and it matters not that he afterwards withdraws from the act. I think also that the conviction sufficiently sets out the offence.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 23, 1864.(Before COCKBURN, C.J., CROMPTON and WILLES, JJ.,
CHANNELL, B., and KEATING, J.)

REG. v. EPHRAIM GRAY. (a)

Indictment—Felony—Omission of “feloniously.”

indictment under the 24 & 25 Vict. c. 97, s. 15, for the felony of damaging a machine with intent to destroy the same, charged the offence to have been committed “unlawfully and maliciously,” in the language of the statute, but omitted the word “feloniously.”
Id bad, as the word “feloniously” is a term of art and necessary in all indictments for felony, whether at common law or created by statute.

CASE reserved for the opinion of this Court.

At the Michaelmas Quarter Sessions for Essex, held at Chelmsford, on October 20, 1863, Ephraim Gray was put upon trial upon the following indictment:—

Essex } The jurors for our Lady the Queen upon their oath pre-
to wit. } sent, that Ephraim Gray, late of the parish of Romford, in
the county of Essex, labourer, on the 29th October, A.D. 1862, with
fire and arms, at the parish aforesaid, in the county aforesaid, did
unlawfully and maliciously damage, with intent to destroy, certain
machines, then and there being and used for ploughing and performing
other agricultural operations, to wit, two ploughs and one scarifier, the
property of John Samuel Finch, against the form of the statute in such
matters made and provided, and against the peace of our Lady the Queen,
the Crown and dignity.

He pleaded Not Guilty.

His counsel objected to the validity of the indictment, that the word “feloniously” was omitted from it, and also contended that the ploughs which he was charged with unlawfully and maliciously damaging were one of them a patent plough of stall, and the other an ordinary plough both of them of a

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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description commonly in use in agriculture, and worked by horses, and the scarifier also was of a description commonly in use, the damaging was not an offence within the statute 24 & 25 Vict. c. 97, s. 15.

The Chairman left the facts to the jury, who found the prisoner guilty, and the Court directed that the prisoner should enter into a recognizance of bail, with a surety in the sum of 50*l.*, conditioned to appear and receive judgment when called upon, and reserved the two questions of law for the consideration of the Justices of either Bench and Barons of the Exchequer.

C. G. ROUND, Chairman.

Murphy, for the prisoner.—The indictment is bad for the omission of the word “feloniously.” It is founded on the 24 & 25 Vict. c. 97, s. 15, which enacts that, whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless any machine or engine, &c., shall be guilty of felony. This being a charge of felony, it is necessary to allege that the person charged feloniously committed the act. The old law, that all felonies must be laid to have been done “feloniously,” is not altered by the Consolidated Criminal Statute. (He was then stopped.)

Philbrick, for the prosecution.—The indictment is sufficient and follows the words of sect. 15, charging that the prisoner did unlawfully and maliciously damage, &c., and alleges in word what that section declares to be a felony. In a note by Hammond to Com. Dig. Indictment G. 6, “So an indictment for felony ought to say *felonice*,” referring to *Rex v. Johnson* (M. & S. 539), where the word feloniously was omitted before the word embezzle, it is said “If a statute enacts that specific facts shall amount to the crime of having feloniously stole another’s property, by stating those facts without more, the crime of larceny is sufficiently charged; it is not, in deed, *totidem verbis* charged that he feloniously stole another’s property, but that charged which the law has declared shall be equivalent thereto. [By the COURT.—But the indictment in *Rex v. Johnson* concluded “And so the jurors say that he did ‘feloniously’ embezzle,” and that was held sufficient: (*Rex v. Crighton*, Russ. & Ry. 62. WILLES, J.—In *Holford v. Bailey* (13 Q. B. 446), the Court said, that where the words are words of art, such as “felony, “murder,” “burglary,” you cannot use equivalent expressions. That was in a case where the argument was whether equivalent expressions would do.] If this were an indictment at common law, I admit nothing could cure the defect. [COCKBURN, C.J.—What distinction can there be between the unwritten law, which attaches the crime of felony to a given state of facts, and the statute law, which does the same?] He referred to Hawk, P. C. “Indictment,” ss. 55, 110.

COCKBURN, C. J.—All the text-books lay it down as a general

rule, without any distinction as to felonies at common law or by statute, that in an indictment for felony the word "feloniously" must be used. I think that principle is well founded in substance, and that it is a wholesome rule that there should be on the face of the indictment an intimation whether the offence charged is a felony or misdemeanor. It would produce great confusion if it were not so, and it is safer to adhere to the old rule. Therefore, the indictment not having laid the offence to have been done "feloniously," it is bad.

CROMPTON, J.—I am of the same opinion. This is not a mere technical rule. According to all the precedents and text-books, it is necessary to show on the indictment whether a felony or misdemeanor is charged.

The rest of the Court concurring,

Conviction quashed.

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Feloniously.*

COURT OF CRIMINAL APPEAL.

January 23 and 30, 1864.

Before COCKBURN, C.J., CROMPTON and WILLES, JJ.,
CHANNELL, B., and KEATING, J.)

REG. v. BUNKALL. (a)

*Larceny as bailee—Purchase by agent of goods for the prosecutor—
Appropriation to prosecutor.*

The prisoner was accustomed to fetch coals from the depot with his own cart and horse, for different people, for remuneration. The prosecutor gave him 8s. 6d. to buy and fetch for him half-a-ton of coals. He went and procured 9 cwt. to be put into the cart and 1 cwt. into a sack, and paid 8s., and subsequently the additional 6d. He delivered 9 cwt. only to the prosecutor, retaining the other 1 cwt.

Held, that there was evidence of an appropriation of the coals to his own use, so as to vest the possession in the prosecutor and support a conviction for larceny as a bailee.

CASE reserved for the opinion of this Court.

At the Quarter Sessions at Swaffham, in Norfolk, on the 28th October, 1863, William Henry Bunkall was indicted for em-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-law.

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bezzling eight stones weight of coals, the property of his master Henry Hart. In a second count of the indictment he was charged with the larceny of the said coals, which were therein also laid as the property of the said Henry Hart.

At the trial, it appeared that the prosecutor, Henry Hart, was a blacksmith, residing at East Bradenham, in the said county and the prisoner was a master miller residing in the same parish.

The prisoner had a horse and cart of his own, with which he was in the habit of carrying out his goods for sale, and had, from time to time, brought with his said horse and cart small quantities of coal for the prosecutor and others from Messrs. Marriott's coals at Durham, a railway station in the neighbourhood, and receiving on each occasion at the rate of 4s. per ton from the prosecutor by way of remuneration.

On the 31st July the prosecutor requested the prisoner to fetch him, on the following day (August the 1st), half-a-ton of coal from the said station, and on the next morning (August the 1st) Robert Firman, a servant of the prosecutor, by his master's orders, took to and gave to the prisoner 8s. 6d. of his master's money to pay for the same.

On the said 1st of August the prisoner proceeded to the Durham station with his own horse and cart, and there saw Rix, a person in Marriott's employ. Rix's evidence was as follows:—"The prisoner said 'I want half-a-ton of blacksmith's coals.' I put nine hundredweight of coals in the cart and one hundredweight of coals in a sack. Bunkall asked me to put the hundredweight in the sack, as he said the cart would hang. He paid me 8s. for the coals; the price was 8s. 6d. He said he had not more money than Bunkall has since paid the 6d."

In cross-examination the witness stated that he sold the coal to the prisoner and gave him credit for the balance of the price. Nothing was said as to the coals being for anybody else than Bunkall, nor was the prosecutor's name ever mentioned. Rix made out a receipt for the coals as bought by Bunkall. On the arrival of the prisoner with his cart at the prosecutor's house the prosecutor immediately told the prisoner that he did not think there was half-a-ton of coals in the cart. The prisoner said there was full weight, for he had seen them weighed. The prosecutor then said he should weigh them, and did so in the prisoner's presence, and found them a hundredweight short. The prosecutor said he should go to the station and make enquiries, and did so, and on his return the same evening he saw the prisoner, who confessed to taking the coals, and said he was very sorry, and hoped the prosecutor would not do anything in it.

The prisoner afterwards pointed out a hundredweight of coals in his shed of the same kind as those delivered to the prosecutor, as his (prosecutor's) property.

Those aforesaid coals form the subject of this indictment.

Before the coals were missed the prisoner said the job was worth more money, and he ought to have another 6d.

On cross-examination the prosecutor stated that the horse and cart in which the coals were brought from the station were the property of the prisoner. That he was at liberty to fetch them when and how he liked. That save as aforesaid the prisoner had never been in any way in the employment of or received any wages from him.

Upon these facts it was objected by the counsel for the prisoner that the prisoner could not be found guilty of larceny, as the goods in question had never been in the possession, constructive or otherwise, of the prosecutor, nor was the prisoner bound to deliver these specific goods to the prosecutor; nor of embezzlement, inasmuch as he was not employed in the capacity of a servant; nor were the goods delivered to him on the account of the prosecutor, as his employer, within the meaning of the statute 24 & 25 Vict. c. 96.

The Court left the case to the jury whether the prisoner (if guilty), was guilty of embezzlement or larceny, and the jury found the prisoner guilty of larceny, upon the second count of the indictment.

Judgment was respited, and the prisoner discharged upon recognizance of bail, to appear and receive judgment when called upon.

The opinion of the Court for Crown Cases Reserved is requested, whether, upon the facts stated, the prisoner was properly convicted of larceny.

Drake, for the prisoner.—It is submitted that the conviction for larceny cannot be sustained, as the coals had not been in the possession, actual or constructive, of the prosecutor. In *Reg. v. Reed* (6 Cox Crim. Cas. 284), the coals were placed by his servant, the prisoner, in the prosecutor's own cart. And in *Spear's* case (2 Leach C. C. 962), the oats, the subject of the larceny, were put in the prosecutor's own barge, and the prisoner was the servant. Here, the coals were bought by the prisoner, who was not the servant of the prosecutor, and put into his own cart, over which the prosecutor had no control. In *Rex v. Walsh* (4 Taunt. 276), Heath, J., said :—" *Spear's* case," on which *Reg. v. Reed* a good deal depended, "went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary." The case finds that the prisoner was to fetch the coals how and when he liked; and credit was given to the prisoner. In *R. v. Reed* the coals were expressly bought for the prosecutor, and credit given to him. It may be contended, in this case, that the prosecutor not only had not possession, but not even a property in the coals. CROMPTON, J.—If I remit to my agent, and tell him to buy and send me timber, and he does buy timber, but misappropriates it, could I not sue for it as a bailee? It comes almost within the principle of *Sir Thomas Plumer's* case, *Taylor v. Plumer* (3 M. & S. 562). (a)] It is submitted, that until the

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bailee—
Appropriation.

(a) *Sir Thomas Plumer's* case came before the Courts both in a criminal and civil point

COURT OF QUEEN'S BENCH.

January 27, 1864.

(Before BLACKBURN and MELLOR, JJ.)

NASH v. THE QUEEN. (a)

Indictment—Bankruptcy Act, 1861—Not discovering estate on examination—Duplicity—Averments.

*An indictment against a bankrupt under 24 & 25 Vict. c. 134, s. 221, for not upon his examination discovering all his property, alleged, that on, &c., N. was adjudged bankrupt by the Court of Bankruptcy for the L. district, the court duly authorised to adjudicate, and that the said N. upon his examination in the said court, to wit, on, &c., with intent to defraud and defeat the rights of the creditors, did not fully discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and in goods, and did not, as to part of his the said N.'s property not being sold in the way of trade or laid out in ordinary family expenses, fully discover to the best of his knowledge and belief how, and to whom, and for what consideration, and when, he had disposed of them, to wit, 1000*l.* sterling, 1000 sacks of corn, 10 horses, &c., &c. :*

Held, a good indictment, on error after conviction and judgment :

Held, also, that the objection of duplicity to a count of an indictment is not open on a writ of error :

Held, also, that where the offence is charged in the words of the statute creating it, the want of averments specifying the property, or time, number and value, is cured after verdict by the 7 Geo. 4, c. 64, s. 21.

The above indictment did not aver what the property was which the bankrupt did not disclose, or allege that he had property, although it charged him with not disclosing how he had disposed thereof :

Held, that the indictment was sufficiently certain after verdict.

W RIT of error, after conviction and judgment, upon an indictment under the Bankruptcy Act (24 & 25 Vict. c. 134, s. 221.)

The following was the first count of the indictment :—

Lancashire } The jurors for our Lady the Queen upon their oath present,
to wit. } that heretofore, to wit, on the 14th day of March, 1863,
Samuel Nash was duly declared and adjudged bankrupt by the Court of

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

bankruptcy for the Liverpool district, the said court being then the court duly authorised and competent to adjudicate as aforesaid. And the said jurors upon their oath present, that the said S. Nash having been so declared and adjudged bankrupt upon his examination in the said court, to wit, on the 18th day of March, 1863, with intent to defraud and defeat the rights of the creditors of the said S. Nash, did not fully and truly discover to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods, and did not, as to part of his the said S. Nash's property, not being partly and *bonâ fide* before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expenses of his the said S. Nash's family, fully and truly discover to the best of his knowledge and belief as aforesaid, how and to whom and for what consideration and when he had disposed of, assigned, or transferred such part thereof, to wit, 1000*l.* sterling, 1000 sacks of corn, 1000 sacks of flour, ten horses, ten carriages, five clocks, five boxes, and other goods and effects, being part of the property of the said S. Nash as aforesaid, contrary to the statute in such case made and provided, and against the peace of our said Majesty the Queen.

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The indictment contained several other counts (not now material).

The prisoner pleaded not guilty and was tried, but convicted on the first count only, and judgment passed.

Whereupon the prisoner brought a writ of error upon the judgment, and assigned the following grounds of error:—

"The said S. Nash sayeth, there is manifest error in this, to wit, that the first count of the indictment charges that the plaintiff on his examination in the Court of Bankruptcy for the Liverpool district, did not, as to part of the property of the plaintiff, fully and truly discover to the best of his knowledge and belief how and to whom and for what consideration and when he had disposed of, assigned, or transferred such part of his property, whereas it is not alleged in such first count that the plaintiff had in fact disposed of, assigned, or transferred such part of his property; therefore in that there is manifest error. There is also error in this, to wit, that it is not alleged in the said first count that the plaintiff on the examination alleged in such first count was examined upon the matters in such first count alleged and referred to, or that on such examination he was required and bound to discover the matters and things which the said first count charges that the plaintiff did not discover. That it is consistent with the allegations in the first count, that the plaintiff was on the occasion alleged examined as to other matters and things and could not have discovered the matters and things which the said first count charges that the plaintiff did not discover; therefore in that there is manifest error. There is also error in this, to wit, that the first count is double and multifarious; therefore in that there is manifest error.

Joinder in error.

Aspinall for the plaintiff in error.—It is submitted that the first count is bad upon writ of error. That count is founded on

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the second clause in sect. 221 of the 24 & 25 Vict. c. 134, which, after enacting that a bankrupt who shall do any of the acts specified in the section with intent to defraud or defeat the rights of the creditors shall be guilty of a misdemeanor, provides in clause 2 "If he shall not, upon his examination, fully and truly discover to the best of his knowledge and belief all his property real and personal, inclusive of his rights and credits, and how and to whom and for what consideration and when he disposed of, assigned, or transferred any part thereof, except such part as has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expenses of his family, or shall not deliver up to the court, or dispose as the court directs, of all such part thereof as is in his possession, custody, or power, except the necessary wearing apparel of himself, his wife and children, and deliver up to the court all books, papers and writings in his possession, custody, or power relating to his property or affairs." This clause consists of three parts, and the first part is governed by the second. The first part is not disclosing all his property, and the second is the not disclosing how he had disposed, &c., of any part of his property. The first and second parts are connected by the conjunction "and," whereas in the commencement of the third part the disjunctive "or" is used. If the first and second parts are construed as distinct offences, then the count is bad for duplicity and multifariousness. If the first part is a distinct offence, that part of the indictment is bad for want of certainty and not giving reasonable information as to the charge. The specific thing must be charged which it is said has not been discovered. In cases of this kind, where the prosecution is ordered by the Bankruptcy Court, there are no depositions, and the first intimation is the notice of the bill having been found by the grand jury. As to the second part of the count, that the bankrupt did not discover how he had disposed of part of his property, it is not alleged that he had property to dispose of. [BLACKBURN, J.—Is not that cured by the verdict? The jury could not have convicted without finding that he had property.] Then, assuming the count to be double as containing two distinct offences, it is bad. Again, another objection is, that it does not appear on the face of the count that the bankrupt had been examined as was intended by the statute. The offence is not committed until the entire examination is over. The examination does not necessarily take place in the district court or the court where the adjudication takes place. The proceedings may be transmitted to other courts. [MELLOR, J.—Why are we to assume that the proceedings were transferred from the Liverpool Court?] Consistently with the averment there may have been other examinations of the bankrupt in other courts, and the bankrupt ought to know in what court the offence is said to have been committed: (*Courtivron v. Meunier*, 6 Ex. 74; *Rex v. Walter* 5 C. & P. 138.)

Milward (R. G. Williams with him).—This case falls within the

nment of 7 Geo. 4, c. 64, ss. 20, 21. Sect. 20 specifies certain things, the want of which is cured by the statute after the verdict, &c., including time where time is not of the essence of the offence. And sect. 21 enacts that where the offence charged has been created by any statute, the indictment shall after verdict be held sufficient if it describe the offence in the words of the statute. No distinction is shown between the language of this count and the words of the statute creating the offence. The 14 & 15 Vict. c. 100, s. 24, was also replied upon. [CROMPTON, J., referred to *leg. v. Forsyth*, R. & R. 274.] In *Rex v. Warshaner* (1 Moo. C. 466), where, upon an indictment for having in possession plates upon which was engraved a Polish promissory note for the payment of five florins, "purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicholas, then being king of a certain foreign country called Poland," and the objections were that the note ought to have been stated to be a note in the foreign language and then the meaning of it in English; that it ought to have been stated to be for the payment of foreign money, and that the value in English money should then have been stated: it was held that these objections were cured after verdict by the 7 Geo. 4, c. 64, s. 21: (*Hamilton v. The Queen*, 2 Cox Crim. Cas. 11; *Reg. v. —*, 1 Chit. 698.) Here the count follows the language of the section, and charges the substance of the offence. If the count contains but one offence, for not disclosing property (and not telling how he has disposed of his property may constitute one offence), then the count at the end does specify the things; and if the count contains two offences, the second part may be struck out. As to the averment of the examination, that must be taken in the same sense as in the statute, and it will be assumed to have taken place in the Liverpool district court, as alleged.

BLACKBURN, J.—I think that in this case our judgment should be for the Crown, on the ground that the count in the indictment in which the defendant was convicted is good after verdict, and that the objections made to it are cured by the 7 Geo. 4, c. 64, ss. 20, 21. The offence for which the prisoner was indicted is created by the Bankruptcy Act (24 & 25 Vict. c. 134), sect. 221, which enacts, "that any bankrupt who shall do any of the acts following with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor;" and among the acts enumerated is this one, on which the indictment is framed: "If he shall not, upon his examination, fully and truly to the best of his knowledge and belief discover all his property, real and personal, inclusive of his rights and credits, and how or to whom sold for what consideration and when he disposed of, assigned, or transferred any part thereof," &c. Now, the meaning of that, there can be no reasonable doubt, is, that the offence is complete when the bankrupt, with intent to defraud, does not, on his examination, fully and truly discover all his property, real and personal. And in order to commit that offence, it is plain that he must have

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property real or personal, and that he must keep it with intent to defraud his creditors; and probably no such offence could be committed until his examination is quite over, for it is also plain that if, during any part of his examination, he should make a complete discovery of his property, he has failed to commit the offence. The question now is, is the offence properly charged in the indictment? The old rules of pleading required that in every indictment you should state every matter with a certain accuracy as regards number, time and value; but in very early times it was held that it was not necessary to prove these averments exactly, except where number and value were of the essence of the offence. In the present case, the count alleges that Nash was duly declared and adjudged bankrupt by the Court of Bankruptcy for the Liverpool district, the said court being then the court duly authorised and competent to adjudicate. The count goes on to allege that, upon his examination in the said court, with intent to defraud and defeat the rights of his creditors, he did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods. According to the rule, it would be necessary to allege with certainty the number, value and time, though it would not be necessary to prove them strictly, and so the count would be bad; but then arises the question, is the want of these averments cured by the 7 Geo. 4, c. 64? And does the indictment, as it stands, describe the offence in the words of the statute treating it? If the matter had to be considered now for the first time, a good deal might be said upon it; but in *Rex v. Warshaner* the question distinctly arose and was decided, and we ought to follow and be guided by that decision. In that case a count was held good, after verdict, which stated that the prisoner had in his possession two plates upon which was engraved in the Polish language "a certain promissory note for payment of five florins purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicholas, then being king of a certain foreign country called Poland." At first, there was a difference of opinion among the judges—of seven to six—whether the count ought not to have shown what money florins were and their value, but subsequently they all agreed that the defect was cured by the 7 Geo. 4, c. 64, s. 21, the offence being described in the words of the statute. I do not think it necessary to say whether the objection is cured by Lord Campbell's Act (14 & 15 Vict. c. 100). Mr. Aspinall further contended that the offence was not described in the words of the statute, because the indictment alleges, that it was on his examination in the said court, that is, the Bankruptcy Court, and it might be that the examination took place in the County Court. The words of the statute and of the indictment also seem to point to the whole examination being over, and we are to assume rather that the normal state of things went on in the Bankruptcy Court in Liverpool than that the proceedings were removed into the County Court. Then it was objected that,

Because the count proceeded to state what was perhaps a distinct offence in the last part of the clause of the section, it was bad for duplicity. It may be urged that, in point of fairness, pleadings should not be double, and the prosecutor may be put to elect as to what part of the indictment he will proceed upon. After verdict, it must be taken that the jury found that all that was substantially part of the offence was proved, and though the jury do not know what is the substance of the offence, the judge must be taken to have told them. The latter part of the count may be treated as surplusage and may be struck out. For these reasons I think our judgment should be for the Crown.

MELLOR, J.—I am of the same opinion. No authority has been cited to show that duplicity is a fatal objection in a criminal case after verdict; but, whether that be so or not, I am not aware of any case that decides that the objection is open on a writ of error. It might be open to doubt whether the offence was properly laid in the count, if it had been necessary to decide on the objection before the verdict; but I think that the 7 Geo. 4, c. 64, was intended to cure objections to the indictment for want of certainty, and objections that had no bearing on the merits of the case. It is sufficient after verdict, if, in describing the offence, the language of the indictment follows the words of the statute. Then if the offence here is, as I think, sufficiently described in the words of the statute, the count is not rendered bad by what is added in the count. It is admitted that, unless steps are taken by the creditors to remove the proceedings to the County Court, the examination of the bankrupt must take place in the Court of Bankruptcy. No circumstances are stated to show how the jurisdiction arose in this case; the count alleges the examination to have been "in the said court," which refers to the Bankruptcy Court in Liverpool, which, I think, must be taken to have been the right court. I also think that the entire examination of the bankrupt must have concluded before the bankrupt can be said to have committed an offence under sect. 221. We cannot say that the objections are not cured by the 7 Geo. 4, c. 64, without overruling *Reg. v. Warshaner*.

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Judgment for the Crown.

COURT OF CRIMINAL APPEAL.

*January 23, 1864.**(Before COCKBURN, C.J., CROMPTON and WILLES, JJ.,
CHANNELL, B., and KEATING, J.)*

REG. v. FUIDGE. (a)

*Vexatious Indictments Act—Indictment for false pretences preferred without leave — Quashing objectionable part — Inadmissibility of evidence.**A prisoner was committed upon one charge only of false pretences, but an indictment was preferred, without leave as required by 22 & 23 Vict. c. 17, s. 1, and found by the grand jury containing a second charge of false pretences. The prisoner refused to plead, and the court directed a plea of not guilty to the whole indictment to be entered for him, and received evidence of both charges, after which the prisoner was convicted :**Held, that the proper course was to have quashed the part of the indictment relating to the second charge :**Held, also, that as evidence upon that charge would not then have been admissible, the conviction could not be supported.*

CASE reserved for the opinion of this Court.

William Varley Fudge was tried before me at the Quarter Sessions for the town and county of the town of Southampton, holden by me on the 11th of January, 1864, on an indictment containing two counts. He was charged in the first count of the indictment with having obtained on the 26th of September, 1863, a shawl from Henry Smart by false pretences, and in the second count with having obtained on the 29th of September, 1863, another shawl from Henry Smart by false pretences.

The false pretences were in each case similar.

When the prisoner was placed at the bar his counsel applied to have the indictment or its second count quashed on the ground that the order of committal reciting only one case of obtaining a shawl by false pretences, namely, the one on the 26th of September, the prisoner could not be tried for the subsequent false pretence, the subject of the second count, because the prisoner had

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

not been committed for that specific offence, but only for the one of the 26th of September.

None of the other provisions of the Vexatious Indictments Act had been complied with (22 & 23 Vict. c. 17).

I refused to quash the indictment or its second count, and ruled that the trial should proceed.

On the prisoner being called on to proceed he refused to do so, hereupon I directed the proper officer of the Court to enter a plea of not guilty.

When, on the trial, evidence was tendered by the counsel for the prosecution in support of the second count it was objected to by the counsel for the prisoner, but was admitted by me.

In summing up I left the evidence on the two counts to the jury, as evidence in two separate and distinct cases; and I asked them to return a separate and distinct verdict on each of the counts. They did so, and returning a verdict of guilty on the first count I sentenced the prisoner on that count to three months' imprisonment; and, returning a verdict also of guilty on the second count, I sentenced the prisoner on that count to a week's imprisonment, to commence at the expiration of the sentence passed on the former count.

The questions for the consideration of the Honourable the Justices of either Bench, and the Honourable the Barons of the Exchequer are:—

1. Ought the indictment or its second count to have been quashed?

2. If the second count ought to have been quashed or not proceeded upon was evidence relating to it admissible or inadmissible on the trial of the first count, and if inadmissible can the convictions on the first count be upheld or not.

MONTAGUE BERE,

January 16, 1864.

Recorder of Southampton.

No counsel was instructed on either side.

Yonge, who had been counsel for the prisoner at the trial, by permission, made the following suggestions:—It was clearly wrong, and contrary to the Vexatious Indictments Act, to try the prisoner upon the whole indictment. Leave should have been obtained to insert the second count: (*Reg. v. Bray*, 9 Cox Crim. Cas. 218). The trial was *in invitum* so far as the prisoner was concerned, he having refused to plead. [CROMPTON, J.—In a case tried before me at the Monmouthshire Assizes, on a similar objection, after consulting my brother Channell, I quashed the objectionable counts, leaving the good counts standing. (a) The great error was in directing a plea of not guilty to the whole record to be

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(a) The following is the case alluded to:—*Oxford Circuit, Monmouth, March 31, 1862.*—David Davies, Edward Davies, John Evans, Thomas Phillips, John Williams, and Isaac Vaughan surrendered to take their trial upon a charge of riot and assault, and destroying furniture, &c., on the 12th of September, 1861, at Abercorn.

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entered for the prisoner. [COCKBURN, C.J.—I doubt whether this is not a matter for the discretion of the Court, and whether the prisoner could ask more than that the objectionable count might be quashed.] Then, assuming that the second count ought to have been quashed, the prisoner was entitled to be in the same position as if there had been but one charge before the Court, and if so, the evidence on the objectionable count could not have been given, and was inadmissible: (*Reg. v. Holt*, 8 Cox Crim. Cas. 411). There the prisoner was charged with obtaining a specific sum from A. by false pretences, and it was held that evidence of obtaining another sum from B. by similar pretences within a week was inadmissible to prove guilty intent. The reception of evidence of the charge in the objectionable count operated to the prejudice of the prisoner.

COCKBURN, C.J.—We are of opinion that the first question asked of the Court, whether the second count ought to have been quashed, must be answered in the affirmative. As regards the second question, we are of opinion that the evidence relating to the second count was inadmissible on the trial of the first; and the majority of the Court are of opinion that the conviction upon that count cannot be upheld. (a)

Conviction quashed.

The indictment contained a great many counts, including several which charged a conspiracy.

Huddleston, Q.C., *W. H. Cooke* and *H. James* conducted the prosecution; *R. Sayer* defended David and Thomas Davies; *Smythies* defended Evans and Phillips; and *J. J. Powell* defended Williams and Vaughan.

When the defendants were arraigned *Smythies* objected that the indictment was bad, upon the ground that it contained counts for conspiracy, without showing that such counts were admissible under the recent statute (22 & 23 Vict. c. 17), passed to prevent vexatious indictments for certain misdemeanors. The 1st section of that statute enacts that no indictment for certain offences therein named (including conspiracy) shall be presented to or found by a grand jury, unless the prosecutor has been bound over to prosecute or the defendant has been committed or bound by recognisance to appear to answer to an indictment for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a Judge of a Superior Court, or of the Attorney or Solicitor General.

It was admitted that the counts in question had been improperly introduced into the indictment, but, after a long discussion,

CROMPTON, J., decided that he had power to quash the objectionable counts, and ordered them to be quashed accordingly.

Powell (on the part of Williams and Vaughan), then pleaded a plea to the jurisdiction of the Court to try the indictment, alleging that the indictment, as found by the grand jury, contained the objectionable counts, which had been introduced without the necessary legal authority.

Huddleston, on the part of the prosecution, then handed in a demurrer to the defendant's plea.

A discussion then took place upon the demurrer, but

CROMPTON, J., after consulting Channell, B., gave judgment for the Crown. His Lordship said he thought he had power to quash some of the counts without quashing the whole indictment, though there was no authority for so doing.

Powell said it was the intention of the prisoners whom he represented to sue out a writ of error.

The four prisoners, David and Edward Davies, Evans and Phillips, then pleaded "not guilty," and the trial proceeded as to them, the judgment given by the Court upon demurrer being conclusive as to the other two prisoners.

A writ of error was not sued out, but there is a writ of error on the same ground now pending in the Queen's Bench, Crown Paper, *Reg. v. Dron*.

(a) See next case.

COURT OF QUEEN'S BENCH.

January 30th, 1864.

The COCKBURN, C.J., BLACKBURN and MELLOR, JJ.)

REG. v. HEANE. (a)

*s Indictments Act—Quashing indictment—False swearing—Court martial.**Indictment found by a grand jury not having jurisdiction may be quashed at any stage, at the instance of the defendant, even after plea of guilty. Proof of jurisdiction may be shown by affidavit. Defendant will be left to his writ of error where the want of jurisdiction is not clear.**§ 25 Vict. c. 115, s. 57, enacts that every person who, upon any examination upon oath or affirmation, before any court martial, held in pursuance of the Act, shall wilfully and corruptly give false evidence, shall be liable to the penalties of wilful and corrupt perjury. Whether an indictment under that section is an indictment for perjury within the meaning of the Vexatious Indictments Act (22 & 23 Vict. c. 17)?*

E nisi obtained on behalf of the defendant to quash an indictment found against him at the Central Criminal Court, in 1863, and removed into this Court by *certiorari*.

The indictment charged that the defendant J. L. Heane did, upon examination on oath before a court martial, held in pursuance of the 23 & 24 Vict. c. 123, upon Her Majesty's ship *Thetis*, then being upon the high seas, wilfully and corruptly give false evidence, &c.

The indictment having been found by the grand jury, a bench warrant was obtained by the prosecutor, and the defendant committed to custody, but afterwards held to bail.

On the affidavits it appeared that a court martial had been held on board the *Hibernia*, in Malta harbour, on a young officer (the prosecutor of this indictment), and he was found guilty of the charges preferred against him, and dismissed from Her Majesty's service. The defendant (also a young officer on board the ship) was examined as a witness against the prosecutor, and his evidence on that occasion formed the subject of this indictment.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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ment, which was preferred without any previous investigation or leave of a judge, and found before the defendant returned home. On his arrival home from the Mediterranean he was arrested under the Bench warrant. His defence was conducted by the Admiralty.

By the Vexatious Indictments Act (22 & 23 Vict. c. 17, s. 1) it is enacted "that no bill of indictment for any of the offences following, *i.e.* perjury, subornation of perjury, &c., shall be presented to be found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence if charged to have been committed in England, be preferred by the direction or with the consent in writing of a Judge of one of the Superior Courts of Law at Westminster, or of Her Majesty's Attorney or Solicitor-General for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of one of the Superior Courts of Law in Dublin, or of, &c., or (in the case of an indictment for perjury) by the direction of any Court, Judge, or public functionary authorised by 14 & 15 Vict. c. 100, to direct a prosecution for perjury."

By the 23 & 24 Vict. c. 123 (the Naval Discipline Act), s. 53, it is provided "that every person who, upon any examination upon oath, or upon affirmation before any court martial held in pursuance of that Act, shall *wilfully and corruptly give false evidence*, shall be liable to the penalties of wilful and corrupt perjury."

The 22 Geo. 3, c. 33 (repealed by 23 & 24 Vict. c. 123), s. 17, enacted "that all persons who should commit any *wilful perjury* in any evidence on examination upon oath at any such court martial, or who shall corruptly procure or suborn any person to commit such wilful perjury, shall and may be prosecuted by indictment or information."

Ballantine, Serjt., *Giffard* and *F. H. Lewis* showed cause. First: It is too late after plea, pleaded for the defendant, to apply by motion in this way to quash the indictment: (Archbold's Crim. Plead. 80.) The defendant should except to the indictment before evidence given in open court: (Foster's Crown Law, 230.) It is a matter of discretion for the Court as to quashing the indictment, but unless the point is clear the Court will not decide in a summary way, as the defendant is not without remedy, but may bring error: (*Rex v. Marsh*, 6 A. & E. 236.) [*M. Chambers, contra*, intimated he should contend that there was an entire want of jurisdiction.] Want of jurisdiction in this case can only be shown by affidavits, and an indictment cannot be quashed for matter *dehors* the indictment. The objection must be patent on the face of the indictment. There is no instance of an indictment having been quashed because the grand jury had not jurisdiction to find it. The remedy is by writ of error or plea to the jurisdiction, or on

jection to the admission of the evidence. One of the objections *Reg. v. O'Connell* (11 Cl. & Fin. 155), was that the grand jury had no jurisdiction to find the bill. The matter cannot be tried upon affidavit. Secondly: This is not an indictment for perjury, and if it, the Vexatious Indictments Act does not apply. Perjury is the offence of wilful false swearing before a judicial tribunal, but a court martial is not a judicial tribunal. The indictment is framed upon a charge of false swearing upon the Naval Discipline Act (24 & 25 Vict. c. 115, s. 57). The Act of 22 Geo. 3, c. 33, s. 17, expressly describes the offence of giving false evidence before courts martial as perjury, but the 24 & 25 Vict., which repealed that Act, describes it as giving false evidence. It is like false declarations under the Bankruptcy Act, which are made liable to the penalties of perjury. The Vexatious Indictments Act is confined to specific offences, among which is perjury, and does not include offences which are subject to the same punishment as perjury. Courts martial are peculiar jurisdictions exercised over particular cases, and are governed by peculiar rules of their own, and take cognizance of a variety of matters not offences by the criminal law of the country. No statute was necessary to give a General Admiral power to maintain discipline by martial law within the navy or fleet. *Inter arma silent leges*. Thirdly: The offence here is alleged to have been committed in the harbour of Malta, which is not upon the "high seas;" and therefore the offence was not cognizable in this country at common law. The provisions of the Vexatious Indictments Act could not therefore have been commuted with. (*Rookwood's* case, 13 State Trials, 139; *R. v. Fearnley*, T. R. 316; *Johnstone v. Sutton*, 1 T. R. 548; *R. v. Foster*, Russ. & Ry. 460; *Spicer v. Reed*, Hobart, 62; *R. v. Chapman*, Den. 432; 22 Geo. 2, c. 33, s. 17; 17 & 18 Vict. c. 104, s. 10; 7 & 8 Vict. c. 2, ss. 2, 3; 12 & 13 Vict. c. 106, s. 250.) *M. Chambers*, Q.C., and *West* in support of the rule.—First: here there is a want of jurisdiction to find the indictment, the court will quash the indictment on the application of the defendant, even after plea pleaded. It would be a great abuse to be obliged to proceed upon such an indictment when, after all, it must be reversed for want of jurisdiction: (Hawkins' P. C., bk. 2, 25; Com. Dig. Ind. H.; Bac. Abr. Ind. K.) The objection may be raised upon affidavit—Could not the Court quash an indictment found at Quarter Sessions without jurisdiction? In *v. Williams* (1 Burr. 125) (Lord Mansfield's time) it was held that an indictment might be quashed for want of jurisdiction. The Vexatious Indictments Act prohibits the preferring of an indictment for perjury without going before a magistrate, or by leave. The present is an indictment for perjury. The defendant might have been taken before a magistrate on his arrival in this country, and so a preliminary investigation might have taken place. The Naval Discipline Act enacts that any person who shall wilfully and corruptly give false evidence shall be liable to the penalties of wilful and corrupt perjury. It assumes

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the offence to be perjury. Then a court martial is a judicial tribunal. [MELLOR, J.—In Hawk. P.C., bk. 2; S.C., 69, s. 2, a judicial tribunal is defined to be “any lawful tribunal,” whether it concerns the interest of the sovereign or the subject.] The indictment alleges the offence to have been committed within the jurisdiction of the Admiralty, and so within the jurisdiction of the Central Criminal Court. This is a case pre-eminently within the mischief intended to be remedied by the Vexatious Indictments Act.

COCKBURN, C.J.—If we quash this indictment, it can only be upon the ground that we are clearly of opinion that it is bad which we are not; but if we refuse to do so, and leave the defendant to his writ of error, then the question will be fairly open to discussion. I think that it is open to considerable doubt whether this indictment is within the Vexatious Indictments Act, 22 & 23 Vict. c. 17. That being so, the question is, whether we are now to put an end to the indictment, and so prevent all further discussion upon it? Now, as this application is made to our discretion, we must see that we do not prejudice the parties. I think we ought not to say, with reference to the preliminary objection, that it ought not to prevail. As regards the objection that the motion to quash cannot be made after plea pleaded, I think if it is made to appear clearly that there was no jurisdiction, we have power to quash the indictment at any stage, and even for matter, not apparent on the face of the indictment, brought to our notice by extraneous evidence upon affidavit. But when we come to consider whether the offence charged is within the 22 & 23 Vict., it turns upon whether this is an indictment for perjury or not. If the defendant had been indicted for perjury in the ordinary way, I think it doubtful if the indictment could have been sustained. Formerly there was an undoubted right in the prosecutor to go before the grand jury in the first instance, but that right is taken away in certain cases, and we must see if it is taken away in the present one. I think that is a matter of much doubt, and it would not be right in us to do anything whereby the question may be prevented from being considered by a Court of Error.

BLACKBURN, J.—I am of the same opinion. This is a matter for the discretion of the Court, but still, if the proceedings under the indictment were clearly wrong, this Court might exercise their discretion by deciding summarily that the indictment should be quashed. But when the case is one of doubt, and the circumstances point to no especial mischief that would result from leaving the case for the decision of a Superior Court, it is more discreet so to leave it. Two points of much doubt have been discussed; first, Whether this is an indictment for perjury within the 22 & 23 Vict. c. 17; and, second, Whether the Act applies to offences committed beyond the seas. I think there is so much doubt upon these two points that we ought not to quash the indictment upon the present motion.

MELLOR, J., concurred.

Rule discharged.

COURT OF CRIMINAL APPEAL.

*January 23, 1864.**(Before COCKBURN, C.J., CROMPTON and WILLES, JJ.,
CHANNELL, B., and KEATING, J.)*

REG. v. MATTHEW KNIGHT. (a)

Autrefois acquit—Evidence of larceny—Recent possession.

Prisoner, a servant, was committed to take his trial at the April Sessions on a charge of stealing copper from his masters. He was tried and acquitted. Two days before his trial the prosecutors laid an information and obtained a warrant, under which the prisoner was apprehended, immediately after the acquittal, for stealing other things (five shovels and a riddle) from them previous to his apprehension on the first charge. He was committed for trial on the second charge.

On the second trial, the prisoner pleaded autrefois acquit, and his advocate contended that the prisoner was entitled to succeed on that plea, on the ground that both charges might have been included in the indictment on the first trial. The jury gave their verdict that the prisoner was not acquitted of the second charge on the first trial.

The riddle was not proved to have been in the prosecutors' possession for eighteen months before the trial, and the shovels for eight months, and the evidence was, that the prisoner was first seen about January with the things in his possession, the second trial being in June. The jury convicted the prisoner :

Held, that the conviction was right, and that there was no ground for the verdict being entered for the prisoner on the plea of autrefois acquit ; or for an acquittal on the ground that no recent possession was traced to the prisoner.

CASE stated for the opinion of the Court.

Lincolnshire, Kesteven.—At the General Quarter Sessions of the Peace of our Sovereign Lady the Queen, holden at Bourn, in and for the said parts and county, on Monday, 29th June, 1863, before the Right Hon. Sir John Trollope, Bart. Chairman, William Parker, Esq., and other justices of the peace of our said Lady the Queen:

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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acquitt—
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The prisoner, Matthew Knight, was tried before me at the Easter Quarter Sessions, for the parts of Kesteven aforesaid, held at Bourn aforesaid, on the 6th April, 1863, upon an indictment charging him with having, on the 22nd January, 1863, at Spittlegate, in the said parts, feloniously stolen twenty-five pounds weight of copper, of the value of 1*l.* 3*s.*, of the goods and chattels of one Richard Hornsby the younger and others.

From the evidence produced by the prosecution in support of this indictment, it appeared that the prosecutor's foreman first became acquainted with the loss of the copper on the 12th January, 1863, and that on the 17th of the same month of January the prisoner was apprehended on a warrant, charging him with having committed the larceny on the 6th December, 1862; he was then remanded until the 22nd January, and on that day further remanded until the 6th February, when he was fully committed for trial at the then ensuing sessions, to be held on the 6th April.

At the trial, the attorney for the prisoner took exception to evidence being given of certain admissions made by the prisoner concerning the copper prior to the day named in the indictment, and the objection being allowed, the attorney for the prosecution thereupon withdrew from the case, and the prisoner was acquitted.

Immediately after his acquittal, on the 6th April, the prisoner was again apprehended on a warrant, granted upon a information preferred by the same prosecutors on the 4th April, charging him with having, on the 22nd January, 1863, at Spittlegate aforesaid, in the parts and county aforesaid, feloniously stolen five shovels and one riddle, of the value in the whole 10*s.*, of the goods and chattels of the said Richard Hornsby the younger and others.

In the depositions taken previous to the second commitment, on the 18th April, 1863, the prisoner is therein charged with having feloniously stolen the shovels and riddle on the 22nd January, 1863.

At the present Midsummer Quarter Sessions for the said parts and county aforesaid, held at Bourn aforesaid, on the 29th June, 1863, the prisoner was indicted before me with having, at Spittlegate aforesaid, stolen the said riddle, on the 20th September, 1862; and in a second count he was charged with having, at Spittlegate aforesaid, stolen the said five shovels on the 16th January, 1863.

From the evidence adduced at this second trial it appeared that one of the prosecutors' witnesses saw a riddle branded R. H. and X. (similar to the one produced), on the prisoner's premises, in the summer time of 1862, and that both the riddle and shovels were found by a police constable in the prisoner's possession on the 21st January, 1863. There was no evidence in either case to show on what particular day or month either the copper, riddle, or shovels were stolen.

For several years, and up to the time of his apprehension, the prisoner had been in the employ of the prosecutors, Messrs. Hornsby, of Grantham, who are machine makers, in a large way of business, employing about four hundred hands. The evidence against the prisoner in the first case was chiefly the prisoner's own admission in producing the stolen copper on an implied promise from prosecutor's foreman, which evidence was rejected. In the second case there was no admission or confession. The stolen property was found on the prisoner's premises by the police whilst in custody on remand upon the first charge.

The grand jury having found a true bill, the prisoner pleaded *not guilty*, and, in support of such plea, his attorney raised the following point of law, viz., that the first indictment ought to have included all the articles which the prosecutors, on or previous to the 6th February (the day of first committal), or the 6th April (the day of trial), knew to have been stolen by the prisoner from them; and that they (the prosecutors) could not by an alteration of dates prefer different indictments against the prisoner for offences of the same sort committed at the same place and against the same person. And that, therefore, an acquittal of the offence charged in the first indictment was an acquittal of the offence or offences charged in the second.

In support of this argument prisoner's attorney relied upon the law of including any number of articles in one indictment; and also further cited sect. 16 of 14 & 15 Vict. c. 100, to show that the prosecutors could have inserted any number of cases not exceeding three, provided they were committed within six months; and the *dictum* of Parke, B., as reported in the case of *Reg. v. Bird* (5 Cox Crim. Cas. 1, 11, 20.)

The jury gave their verdict that the prisoner was not acquitted of the second offence.

The prisoner then pleaded not guilty to the felony.

The riddle and shovels were clearly identified to be the property of the prosecutors, and were found in the possession of the prisoner—the riddle in his back yard, one shovel in his coal-house, another shovel in his garden, covered over with ashes, and three other shovels packed up in a distant pig-sty in prisoner's occupation; and one of the prosecutors' witnesses stated that in the beginning of January, about half-past seven o'clock in the morning, the prisoner brought some tools in a barrow into his (the witness's) yard, where the pig-sty was, and stated "he had brought them to put at the top of the pig-sty to be out of the way." The brand mark had been erased from some of the shovels, and the letters M. K. (the prisoner's initials), had been substituted. In cross-examination the foreman stated it was impossible to say when the articles were taken.

The attorney for the prisoner then asked the Court to direct an acquittal on the ground that the riddle not being proved to have been in their possession for the period of upwards of eighteen

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months and the shovels for not less than eight months, there was ~~no~~ recent possession by the prisoner as contemplated by the law, and that, therefore, the prisoner was not bound to account how ~~he~~ came by the property stolen.

I left the whole question to the jury, who returned a verdict of guilty.

The Court sentenced the prisoner to be imprisoned for one calendar month to hard labour, subject to the opinion of the Court of Criminal Appeal upon the following points, taking bail for his rendering himself in execution if the decision of the Court should be against him.

1. Whether an acquittal of the offence charged in the first indictment was an acquittal of that charged in the second; and, if so, ought the prisoner to have been acquitted on the plea of *autrefois acquit*?

2. Whether the Court ought to have directed an acquittal upon the law of recent possession or otherwise, as requested, and upon the grounds stated by the prisoner's advocate.

JOHN TROLLOPE, Chairman.

O'Brien, Serjt., for the prisoner, admitted that he could not sustain the objections made for the prisoner, and reserved for the Court.

By the COURT,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 23, 1864.

per COCKBURN, C.J., CROMPTON and WILLES, JJ.,
CHANNEL, B. and KEATING, J.)

REG. v. KERRIGAN. (a)

False pretences—Evidence.

Indictment charged K. and W. with falsely pretending to B. that they had a quantity of tobacco, which they proposed to sell, and did so, and thereby obtained money from him. The evidence was that the said John Kerrigan and William Wilson on the 17th of September, 1863, unlawfully, knowingly and designedly, and another person, P., acting together, were the chief parties in the false pretences had been made: that the acts of P. were the acts of K., and admissible against him in the indictment.

was reserved at the Quarter Sessions of the county of Derby on the opinion of this Court.

On the 17th of September, 1863, John Kerrigan was committed to the custody of the High Bailiff, Esq., and L. E. Mann, Esq., magistrates for the county of Derby, to take his trial at the Michaelmas Quarter Sessions. The commitment charged him with one William Wilson, that the said John Kerrigan and William Wilson on the 17th of September instant, at Belper, in the said county, did unlawfully, knowingly and falsely pretend to sell to Daniel Barlow two bales of tobacco, containing three hundred pounds weight and for the sum of 49*l.*, whereas, in truth and in fact, the said bales contained about half-a-pound of tobacco only, by which false pretence the said John Kerrigan and William Wilson did unlawfully obtain from the said Daniel Barlow the sum of 49*l.*, with intent then and there to cheat and defraud him, to the damage of the said Daniel Barlow, of the same, contrary to the statute in that behalf made and provided."

The first count charged that Kerrigan and Wilson, "on the 17th of September, 1863, unlawfully, knowingly and designedly, and another person, P., acting together, were the chief parties in the false pretences had been made: that the acts of P. were the acts of K., and admissible against him in the indictment."

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Kerrigan and William Wilson, were possessed of a large quantity of good tobacco, to wit, two bales of tobacco, containing 3 cwt., of the value of 2*l.* per stone weight, and which they the said John Kerrigan and William Wilson proposed to sell, and did sell and deliver to the said Daniel Barlow, by means of which said false pretence the said John Kerrigan and William Wilson did then unlawfully obtain from the said Daniel Barlow the sum of 31*l.* of the moneys of him the said Daniel Barlow, with intent thereby then to defraud, whereas, in truth and in fact, the said John Kerrigan and William Wilson were not possessed, and had not in their possession a large quantity of good tobacco, to wit, two bales of tobacco containing 3 cwt., of the value of 2*l.* per stone weight, as they the said John Kerrigan and William Wilson did then so falsely pretend, but only two bales which contained half-a-pound weight of tobacco, together with a large quantity of stones, bricks, and sawdust, as they the said John Kerrigan and William Wilson, at the time they so falsely pretended as aforesaid, well knew, against the form of the statute in such case made and provided."

Second count.—That Kerrigan and Wilson, "being evil-disposed persons and wickedly devising and intending to defraud, on the 7th of September, 1863, did, amongst themselves and diverse other persons, to the jurors unknown, conspire, contrive, confederate and agree together falsely and fraudulently to cheat and defraud one Daniel Barlow of a large sum of money. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Kerrigan and William Wilson, and other persons as aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy and agreement, did, on the day and year aforesaid, represent to the said Daniel Barlow that they, the said John Kerrigan and William Wilson, had in their possession a large quantity of tobacco of good and valuable quality, to wit, of the value of 2*l.* per stone, and would sell and deliver to the said Daniel Barlow two bales of the said tobacco, containing 3 cwt., for the sum of 49*l.*, and that they, the said John Kerrigan and William Wilson, did deliver to the said Daniel Barlow two bales which they represented and alleged to contain 3 cwt. of good tobacco, of such value as aforesaid, but which said bales contained half-a-pound weight of tobacco only, together with a large quantity of stones, bricks, and sawdust, with intent to cheat and defraud the said Daniel Barlow of a large sum of money, to wit, of the sum of 31*l.*, against the peace of our Lady the Queen, her Crown and dignity."

Wilson was acquitted; Kerrigan was found guilty on both counts.

All the counts referred to the same transaction.

The prisoner pleaded not guilty, and his counsel (Mr. Stephen) then moved the Court to quash the count charging a conspiracy, on the ground that the prisoner had not been committed nor the prosecutor bound over to prosecute on that charge, nor had the

leave of a judge or of the Attorney or Solicitor General been obtained to prefer it, as required by 22 & 23 Vict. c. 17, s. 1. After hearing the counsel for the prosecution, the Court determined to retain the count, and left it to the jury, because they were of opinion that such leave was not necessary when a count for conspiracy was merely a variation of the same charge as that laid in the first count, but only in cases in which conspiracy was an original and distinct offence. The counsel for the prisoner admitted that there was evidence of a conspiracy for the jury, if they had power to try the prisoner on the count in question. The jury convicted the prisoner.

The evidence was as follows:—

Daniel Barlow sworn.—I live in Derby. On August 21st a man called Philip came to my house; he said something about some tobacco. On August 24th J. Kerrigan called and wanted to sell me some silk. I said, "One of your men has been the Friday before." He said, "Yes, it is one of our men; we have thirty men in this country getting orders." He talked in a foreign accent. He said they had a large firm in Liverpool, and dealt in tobacco, tea, and other things; they could sell tobacco cheaper than any other firm, because they imported it all from abroad; they could sell it for 2*l.* a stone. I said I had a friend in the wholesale trade, and I would see him about it. I had asked Philip for a sample. On Friday, August 28th, some one left a sample of two ounces of superior tobacco at my house. Kerrigan did not say where they were staying. I afterwards went to a chop-house next door to the York Hotel, Derby. I found Philip next door, and he took me to Kerrigan to the chop-house. I told them I had seen my friend, and he would take 3 cwt. a week if it was as good as the sample. They said they could supply him with a ton. I agreed for 3 cwt., at 2*l.* a stone, 48*l.* in all. Kerrigan said it was in bales; there might be a stone over or under, but it could be rectified when we settled. He said it was about two miles out of Derby. He said I should have it in two or three days. On September 2nd I went again to the eating-house; the tobacco had not been delivered. I found Kerrigan alone; and asked why it had not been delivered; he said Philip had hurt his foot. He (Kerrigan) was going to Liverpool. I must pay Philip for the tobacco; it would be just the same as paying himself; he had left his address with Philip. On the 7th September Philip came and gave me a piece of paper. (This was not produced in Court.) I went with him to Belper in a trap, to the Angel Inn. He showed me the way. I paid him there 31*l.* on account of 49*l.* I refused to pay him the whole price until I had weighed the tobacco. He gave me no receipt. He went out of the door; I followed. One bale was in the trap. Two men, of whom Wilson was one, were lifting in another. I drove to Mr. Mayers, at Derby, and we opened both bales. The first contained half-a-pound of tobacco spread out at the top, brown paper, stones, bricks, old hay, and sawdust; the other

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contained no tobacco at all. The bales were wrapped up in canvass and tied with tarred cord. I paid Philip in consequence of what Kerrigan said to me. I did not then know Kerrigan's name.

John Barber sworn.—I keep the Angel Inn at Belper. On Thursday, the 3rd of September, Kerrigan came; some other men were there. All used to go out with packs on their backs. Kerrigan went on Friday. On Saturday Philip came; he asked leave to put two bales in an outhouse; this was done. They were canvass bales tied with tarred cord. On Sunday, Kerrigan came. Philip and some other men came with him. Kerrigan and Philip went away. On Monday, the 7th of September, Mr. Barlow and Philip came about dusk in a trap. Philip asked for the key of the outhouse, and I gave it him. Kerrigan employs and supplies hawkers; there were four at my house; he said his men had gone off with his goods.

Rebecca Kirkland sworn.—I keep a shop at Belper, and sell cord, next door but one to Mrs. Coopers. On the 4th of September three men bought some tarred cord. Kerrigan was one of them. He paid for it. The cord produced is similar to it.

Hannah Cooper sworn.—I let lodgings in Belper. On the 5th of September Kerrigan came. Two men, called Philip and Bill, were in the house. On the morning of that day I went out. Philip and Bill were in bed. I returned about nine, and found the door locked. They said I could not come in, they were packing china and glass. I went away for an hour and returned; the men were gone. Two bales, wrapped in sacking, and tied with tarred cord, were in the house; the packages had been recently tarred; some tar was in a pot on the hob of the fireplace. I found some hay and sawdust at the back door. Between three and four p.m., two men took the packages away in a wheelbarrow. On Monday, the 7th of September, Kerrigan came in drunk. Next morning he went out about six, and soon came in again. He said, "Has any policeman been?" I said, "Why?" He said, "Because I have been fighting." He left some things in my charge and went away, and I saw him no more. He said he was going to Chesterfield.

George Carter sworn.—I apprehended both the prisoners on the 8th of September, at Chesterfield station. Kerrigan got out of the carriage first, and I took him, and charged him with obtaining money by false pretences from Dr. Barlow. Kerrigan said, "I don't know any one of that name." I searched him, and found a pill-box with Dr. Barlow's name on it. Next morning Barlow came and identified him. He said to Kerrigan, "Good morning, Monsieur Antonio de Monti." Kerrigan said, "I don't know you."

At the conclusion of the case for the Crown the prisoner's counsel objected that there was no evidence to go to the jury that the prosecutor had obtained any money by false pretences, as the only false pretence within the meaning of the statute was the

tence by the man Philip, that the parcel contained tobacco. The counsel for the prosecution argued that the false pretence was, that the prisoner pretended to be possessed of 3 cwt. of tobacco, worth 2*l.* per stone; that this was so laid in the indictment, and that there was evidence for the consideration of the jury, not only that he made such false pretences and obtained the money of the prosecutor by it, but that he (the prisoner) knew to be false when he made it.

The Court held that there was evidence to go to the jury on both counts of the indictment. The jury convicted the prisoner on both counts. The Court sentenced him to twelve calendar months' imprisonment upon each count, the sentences to run together. The questions for the Court of Criminal Appeal are—1st. Whether the count charging a conspiracy ought to have been left to the jury?

2nd. Whether there was evidence to go to the jury in support of the count charging a false pretence?

F. Stephen, for the prisoner.—First, with regard to the count obtaining money from the prosecutor by false pretences, the only false pretence proved was, that these specific bales at the Angel, Belper, contained tobacco. [CROMPTON, J.—That they were tobacco.] It was not proved that the prisoner Kerrigan took any part in that false pretence. The statement that the prosecutor paid Philip, in consequence of what Kerrigan said to him, may apply to the conversation between Philip and Kerrigan and the prosecutor at Derby, when they said they could supply a bale; or it may apply to the transaction at the Angel, Belper. If it applies to the former, that was not the false pretence by which the money was obtained. There was no case if the prosecutor was induced by the original false statement to enter into the contract, and by a subsequent independent fraud he was defrauded. The original lie was not the false pretence by which the money was obtained. The money was not obtained by what passed at Derby, but by the representations made at the Angel, Belper. [CROMPTON, J.—As soon as a connection was shown between Philip and Kerrigan, the act of one was the act of the other in misdemeanor. Philip and Kerrigan are the same for this purpose]. That is so, the objection is untenable, and it becomes unnecessary to argue the first question. (a)

Buzzard, for the prosecution, was not called upon.

By the COURT,

Conviction affirmed.

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(a) As to this objection, see *Reg. v. Fudge* and *Reg. v. Heane*, *supra*, pp. 446, 449.

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COURT OF CRIMINAL APPEAL.

December 8, 1862.

(Before MONAHAN, C.J., KEOGH, O'BRIEN, and
FITZGERALD, JJ., FITZGERALD and DEASY, BB.)

REG. v. JOHN FARRELL. (a)

Indecent exposure—Indictment—Evidence.

An indictment for indecent exposure, charging the offence to have been committed on a highway, is not sustained by evidence that the offence was committed in a place near the highway, though in full view of it. An indecent exposure seen by one person only, and capable of being seen by one person only, is not an offence at common law. Secus, if there are other persons in such a situation as that they may be witnesses of the exposure.

CASE reserved by Deasy, B., from the last commission at Green-street, held by Deasy and Fitzgerald, BB. The prisoner was tried for indecent exposure of his person. The first count of the indictment charged that the prisoner on the 27th September, 1862, being a scandalous and evil-disposed person, and devising, contriving, and intending the morals of divers liege subjects to debauch and corrupt, on a certain public and common highway situate at Rathgar-road, in the county of Dublin, in the presence of divers liege subjects, and within sight and view of divers other liege subjects through and on the said highway there and there passing, unlawfully, &c., did expose his person. The second count charged the prisoner with committing the same offence on the 24th of September, on the public highway aforesaid. The third count charged the commission of the like offence on the 25th September, in presence of and within sight of divers liege subjects, without stating the offence to have been committed on the public high road. On the trial, a policeman named Reynolds was examined, who stated that on the 27th September he saw the prisoner expose his person in a piece of ground near the road, he being turned so that people passing on the road could

but there being no person on the road. This was repeated, he being then, also, no person on the road. On a third occasion, on the same day, he did the same, there being then two ales coming up the road. A woman was also examined, who deposed that on the 25th September she was in a house adjoining road, cleaning the parlour, when she saw the prisoner commit offence, in the piece of ground spoken of by the first witness.

also deposed that she saw him commit the offence on the 27th September. Counsel for the prisoner objected that there was no evidence to sustain the allegation in the indictment, that the prisoner exposed his person on a public highway. Counsel for

Crown contended that the first count was sustained, but failed to amend the second count, by inserting the words "on a road in view of a public high road." The amendment was refused. At the close of the case, counsel for the prisoner objected, first, that there was no evidence to sustain the allegation in the several counts that the prisoner exposed his person on a public highway; second, that there was no evidence of any public exposure; third, that the Court had no jurisdiction to amend the second count in the manner specified; fourth, that even upon the second count as amended, there was no evidence of a public exposure; and he called upon the Court to direct an acquittal. The Court refused to do, but left the case to the jury, who convicted the prisoner, who was then sentenced to twelve months' imprisonment; but the questions raised on his behalf were reserved for the Court of Criminal Appeal.

Curran, for the prisoner, opened the case, but was stopped by the Court, who called upon,

Sullivan, Serjt. (with him *Beytagh*), for the Crown, to sustain the conviction.—The first count, charging the offence to have been committed on the 27th September, is sustained by the evidence of Reynolds. [MONAHAN, C.J.—Is there any authority to show that when the indictment is for exposure on a public road, evidence of an exposure near the road will sustain the indictment?] There is not. The indictment might be read as expressing that the prisoner meant to corrupt, &c., persons on the road. MONAHAN, C.J.—We cannot give the indictment that meaning.] Then, as to the second count as amended. No doubt, the exposure was seen only by one person, but the prisoner exposed himself in such a way as that any persons who might be passing might see him: (*The King v. Webb*, 2 C. & K. 933; and the case mentioned by Parke, B., at p. 935 of the report). [MONAHAN, C.J.—It is evident that there were persons on the road in the case mentioned by Parke, B.] *The King v. Crumden* (Campb., 89); *The Queen v. Watson* (2 Cox Crim. Cas. 376); *The King v. Sedley* (Sid. 168).

MONAHAN, C.J.—We must quash the conviction; but it is to be taken that we lay it down that if the prisoner was seen by but one person, but there was evidence that others might have witnessed the offence at the time, we would not uphold the

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conviction; but in this case there is no evidence that any one could have seen the prisoner commit the offence on the 24th September, except the one female. Therefore, all that we say is, that an exposure seen by one person only, and being capable of being seen by one person only, is not an offence at common law. If there had been others in such a situation as that they could have seen the prisoner, there would have been a criminal offence.

Ireland.

MARYBOROUGH SUMMER ASSIZES, 1863.

(Before the LORD CHIEF BARON.)

REG. v. WILBAIN and RYAN. (a)

Evidence—Comparison of handwriting—Police officers and constables are not admissible as experts.

THE prisoners were indicted for writing and sending a threatening letter.

Ball, Q.C., for the prosecution, proposed to examine sub-inspector M. B., who had compared the writing in the threatening letter with the writing in certain books found in the prisoner's house, and which the prisoner Elizabeth had admitted to be in her handwriting, as to whether or not they were all, in his opinion, written by the same person.

Curran, for the prisoner, objected to this evidence.

Ball, Q.C., replied, that M. B. had given similar evidence without objection on trials in different counties.

The CHIEF BARON refused to receive the evidence, and said that this class of evidence should be given by witnesses skilled in deciphering handwriting.

The prisoners were acquitted.

(a) Reported by CONSTANTINE MOLLOY, Esq., Barrister-at-Law.—(From the *Irish Jurist*, by permission).

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COURT OF CRIMINAL APPEAL.

April 23, 1864.(Before ERLE, C.J., POLLOCK, C.B., MARTIN, B.,
BLACKBURN and MELLOR, JJ.)

REG. v. SAMUEL PORTER. (a)

*Lunatic—Ill-treatment of—Neglect by brother having care of—
16 & 17 Vict. c. 96, s. 9.**1 brother who abuses, ill-treats, or wilfully neglects his lunatic brother,
of whom he has the care or charge, is guilty of a misdemeanor under
the 16 & 17 Vict. c. 96, s. 9.*

CASE reserved for the opinion of this Court by Martin, B.

The prisoner was convicted at the last Cornwall Assizes, upon the following counts of the indictment, which are framed upon the latter part of the 9th section of the statute 16 & 17 Vict. c. 96.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said Robert Porter was a lunatic within the meaning of the statute in such case made and provided. And that the said Samuel Porter before and at the time of committing of the offence had the care and charge of the said Robert Porter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Porter, having the care and charge of the said Robert Porter as last aforesaid, unlawfully did wilfully neglect the said Robert Porter so being such lunatic as aforesaid, against the form of the statute, &c.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said Robert Porter was a lunatic within the meaning of the statute in such case made and provided, as the said Samuel Porter well knew. And that the said Samuel Porter before and at the time of the committing of the said offence had the care and charge of the said Robert Porter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Porter, so having the care and charge of the said Robert

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Porter as last aforesaid, unlawfully did wilfully neglect the said Robert Porter so being such lunatic as aforesaid, as the said Samuel Porter well knew, against the form of the statute, &c.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before and at the time of the committing of the offence next hereinafter mentioned, the said Robert Porter was alleged to be a lunatic within the meaning of the statute in such case made and provided. And that the said Samuel Porter before and at the time of the committing of the said offence had the care and charge of the said Robert Porter. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Porter, so having the care and charge of the said Robert Porter as last aforesaid, unlawfully did wilfully neglect the said Robert Porter so being such alleged lunatic as aforesaid, against the form of the statute, &c.

The evidence was, that the lunatic became so upwards of twenty-five years ago. At first the care and charge of him was taken by his father and mother. They have been dead many years, and upon the death of the survivor a sister took charge of him. She went to America upwards of eleven years ago, and since then the prisoner, who is his brother, took upon himself and has had the sole and exclusive care and charge of him, and continued to have it until December last, when the lunatic was removed to the county asylum.

A sum of 6s. or 7s. a week was received and taken by the prisoner under some family arrangement out of the rents of some houses, which apparently were the property of the lunatic, in respect of such care and charge.

The lunatic was kept in a room adjoining the prisoner's house, and was attended to and supplied with food exclusively by the prisoner, or in his absence by his wife. He was entirely deprived of reason, and in body was perfectly helpless and unable to move.

At the close of the evidence for the Crown, it was objected by the counsel for the prisoner, that the case was not within the above-mentioned section, inasmuch as the care and charge was by a brother of a brother in the private house of the former, and *Reg v. Rundle* (6 Cox Crim. Cas. 549), was cited.

I request the opinion of the Court as follows:

First, whether, if a brother voluntarily takes upon himself, under such circumstances as above mentioned, the care and charge of a lunatic brother, and keeps him in his private house, and abuses or ill-treats, or wilfully neglects him, is it a misdemeanor within the 9th section of the 16 & 17 Vict. c. 96?

If the answer be in the negative, then—

Secondly, whether, assuming that the wilful neglect of the lunatic be an indictable offence at common law, can the prisoner be lawfully convicted of it under the above counts; and if so, then, whether such wilful neglect is an indictable offence at common law?

SAMUEL MARTIN.

H. T. Cole for the prisoner.—The conviction cannot be sustained.

The prisoner was found guilty of neglect *simpliciter*. The provisions in the Lunacy Acts providing against the abuse and ill-treatment and neglect of lunatics apply only to persons attending on them when in licensed houses or registered asylums, and not to cases like the present. The 8 & 9 Vict. c. 100, s. 56, is expressly limited to such persons. The 16 & 17 Vict. c. 96 was passed to amend that act, and seems to have had in view only houses licensed for the reception of lunatic patients and registered hospitals or asylums. Sect. 9, on which the counts of the indictment now in question were framed, is as follows:—

9. If any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient; or any attendant of any single patient in any way abuse, ill-treat, or wilfully neglect any patient in such hospital or house, or such single patient; or if any person retaining or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic, or other person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, or to forfeit for any such offence, on a summary conviction thereof before two justices, any sum not exceeding 20*l*.

The words "any person having the care or charge of any single patient" seem to refer to a different case from that of a brother or other blood relation taking upon himself the care of a lunatic relative. [MELLOR, J.—The title of the act is simply for the regulation and treatment of lunatics, without any limitation.] POLLOCK, C.B.—The fact of the prisoner being the lunatic's brother has nothing to do with the construction of the statute.] The statute only contemplates the case of a person having the charge of a single patient for gain and emolument under a money contract. [ERLE, C. J.—By the 8 & 9 Vict. c. 100, s. 44, a licence was not required for a house for the reception of a single lunatic, but only where two or more were received. And sect. 90 places persons who receive for profit "any one patient" under certain obligations, from which persons who derive no profit are exempt. But then, if a person takes charge of a person for no money, why is he exempt from the penalties of the 16 & 17 Vict. c. 96, s. 9, in case he in any way abuses, ill-treats, or wilfully neglects such lunatic?] The patient Robert Porter has never been found lunatic. [BLACKBURN, J.—If the prisoner shut him up and did not allow him to be seen, and treated him as a lunatic, as against him the patient must be regarded as an alleged lunatic.] In *Rex. v. Smith* (2 Car. & P. 449), it was held that one who had an idiot brother as an inmate in his house, and omitted to supply him with proper food, &c., was not indictable at common law for such neglect. And in *Reg. v. Rundle* (6 Cox Crim. Cas. 549), it was held that a husband who ill-treats his lunatic wife was not subject to the penalties of 16 & 17 Vict. c. 96, s. 9. [POLLOCK, C.B.—The ground of the decision was that the statute was not intended

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to interfere with persons in the relation of husband and wife, but a brother has no legal control over a brother.]

M. Smith, Q.C. and Stock, for the prosecution, were not called upon.

POLLOCK, C.B.—This conviction must be affirmed. We are all of opinion that this case is not governed by *Reg. v. Rundle*, which was entirely a different case. The present case falls within the words of the 16 & 17 Vict. c. 96, s. 9, for the prisoner was a person having the care of a lunatic patient, and had wilfully neglected him. This case being within the words of the section, and not within any of the cases which have created exceptions to it, the conviction ought to be sustained.

ERLE, C.J. had left the court, but had intimated that he was of opinion that the conviction ought to be affirmed.

MARTIN, B.—I am of the same opinion. Mr. Cole has failed to answer the question I put to him, "if the section does not apply to this case, to what does it apply?" He said it does not apply to the case of blood relations. Now, as I read sect. 9, the Legislature has provided for three cases: 1, the case of attendants and others employed in registered hospitals and licensed houses; 2, the case of any skilled person having charge of a single patient; and, 3, the case of any one who takes on himself to attend or take charge of any single patient. And if any one in such last class abuses, ill-treats, or wilfully neglects the lunatic, he is liable to the penalties created by the section. The prisoner is clearly within the third class. This is a very salutary enactment.

BLACKBURN and MELLOR, JJ. concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 23, 1864.(Before ERLE, C.J., POLLOCK, C.B., MARTIN, B.,
BLACKBURN and MELLOR, JJ.)REG. v. GEORGE FULLFORD and FREDERICK GEORGE
FULLFORD. (a)

Misdemeanor—Local Government Act—Indictment for bringing forward a house in a street without consent of local board—Street—24 & 25 Vict. c. 61, s. 28.

Whether a house or building forms part of a street within the meaning of the 24 & 25 Vict. c. 61, s. 28 (Local Government Act Amendment Act) is a question of fact for a jury.

Seemle, that the word "street" in the above section applies only to a row of houses in some degree continuous and proximate, having an apparent continuous line, and not to a set of detached houses at irregular distances and not in a continuous line.

CASE reserved for the opinion of this Court by Erle, C.J.

At the Assizes and General Gaol delivery holden at Winchester and for the county of Southampton, in July last, George Fullford and Frederick George Fullford were tried before me on an indictment framed on the 28th section of the 24 & 25 Vict. c. 61.

The indictment charged that they, after the passing of the Local Government Act (1858) Amendment Act 1861, at the parish of Fareham in the said county, and within the district of certain local Board of Health there, to wit, the local Board of Health for the district of Fareham, in the county aforesaid, unlawfully and injuriously did bring forward a certain house there, situate and being in the occupation of the said George Fullford, and then forming part of a certain street there, to wit, West-street, and numbered 17 in the said street, beyond the front wall of the house and building on either side of the said house of the George Fullford, to wit, fifteen feet beyond the front wall of the house and building on the west side of the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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said house of the said George Fullford, and four feet beyond the front wall of the house and building on the east side of the said house of the said George Fullford, without the previous consent of the said local board of health.

Other counts charged the defendants in like manner, with bringing forward a certain building, forming part of West-street, and numbered 17, and with building an addition to a house and to a building forming part of West-street and numbered 17, beyond the front of the house and building on either side thereof without such consent.

The facts of the case were as follows:—

By an Order in Council, dated 5th September, 1849, and published in the *London Gazette* of September 18, 1849, the Public Health Act (sects. 50 and 96 excepted) was ordered to be applied to “the entire area, places and parts of places comprised within the boundaries at present fixed as the boundaries of the parish of Fareham,” and such area, places and parts of places were constituted a district for the purposes of the said Act.

The defendants are father and son. The former, a builder, purchased, some years ago, a piece of land situate on the north side of the West-street of the town of Fareham, on which he erected a dwelling-house, in which he has since resided with his family; and what is now called the West-street is a public highway, and forms a portion of a turnpike-road originally made under the provisions of a local Act, 50 Geo. 3, c. 14, but is now maintained and regulated by a subsequent local Act of 1 Will. 4, c. 61, both of which Acts are declared to be public Acts.

The said house was so erected as to leave an intervening space between it and the public highway of the said street, such intervening space being used as an ornamental garden in front of the said house, and being about sixteen feet deep on the east side, and twelve feet deep on the west side of the said house, and being separated from the highway of the said street by a dwarf wall and iron palisades, outside which is a footway and then a carriage road, which together form the highway of the street aforesaid.

The said house of the defendant George Fullford, at the time alleged in the indictment, had a house on either side of it; that on the east being in course of erection, and extending several feet beyond the house of the said George Fullford, and each of which last-mentioned houses also had an intervening space or garden between it and the highway of the street aforesaid.

It was agreed by the counsel on both sides that the plan produced at the trial on the part of the prosecution, and the model furnished on the part of the defendants, might be referred to for the purpose of more particularly delineating the relative position of the said before-mentioned houses and public highway.

In the month of October 1862 the defendants proposed to erect an addition to and in front of the said house, to be used as a shop; and on the 31st October, 1862 the defendant Frederick George Fullford delivered to Thomas Buckham, the surveyor to the

Fareham local Board of Health, a plan of the proposed work, and also an application in writing to the local Board of Health, in order that he might lay it before the said local board.

The following is a copy of such application :

Meadow House, Fareham, Oct. 31.

GENTLEMEN,—I have this day forwarded to your surveyor Mr. Buckham the plan and specification of a shop which I propose building in the West-street, Fareham. I also beg to inform you that the work was commenced previous to the publication of the notice which you have recently issued, but is now stopped until the decision of the board is made known as to the distance the building is to be erected from the street.

(Signed)

F. G. FULLFORD.

The following is the notice so referred to, which had been previously printed and issued by the said local board of health :

NOTICE.

Whereas by the Local Government Act (1858) Amendment Act, 1861, sect. 28, it is enacted as follows:—

It shall not be lawful, at any time or times hereafter, within the district of any local board of health, to bring forward any house or building, forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto, beyond the front of such house or building, on either side of the same as aforesaid, without the previous consent of such local board.

Now we, the Local Board of Health for the district of Fareham, in the county of Southampton, do hereby give you notice, that any person offending against the above-named provisions of the said act, will be proceeded against as the law directs.

By order of the Local Board,

ALFRED DRIVER, Clerk.

Fareham, 18th Oct. 1862.

The said plan of the said Frederick George Fullford showed that the proposed erection was intended to cover the whole of the intervening space between the house of the said George Fullford and the said street or highway, except an interval of nine inches immediately against the footway forming part of the said highway, and that it was to extend eight feet beyond the front of the house on the east side thereof nearest to the said highway. But in truth no part of the said erection was built nearer to the said highway than 4ft. 4in.

The said application so made by the said Frederick George Fullford was taken into consideration by the local board of health on the then next following day, and a resolution was come to by the said board, which was communicated to the said defendants by the following letter :

Fareham, 1st Nov. 1862.

SIR,—I am directed by the Fareham Local Board of Health to inform you that the plan of a shop intended to be erected by you in the West-

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street has been laid before them, and that with regard to the boundary they require you to keep the line of street which will be pointed out to you by the surveyor.

I am, Sir, &c.,

ALFRED DRIVER, Clerk.

Mr F. G. Fullford.

On the same day (the 1st November) the said Thomas Buckham, by direction of the said local board, went to the said house of the said George Fullford, and there saw the two defendants George Fullford and Frederick George Fullford, who were then personally working at the said proposed erection; and the said Thomas Buckham pointed out on the ground there the exact line within which the said defendants were required by the said local board to keep the said erection; that is to say, the extreme of the front wall (being that of the door porch) of the house, on the east side of the said proposed erection, and which was many feet beyond the front wall of the house on the west side of the said proposed erection.

The defendants subsequently built the addition to the said house, as shown on the said plan and model, being beyond the line of front so pointed out by the said Thomas Buckham, and contrary to the aforesaid directions, and against the consent of the said local board of health; and the said shop, which has an internal communication with the said dwelling-house, was opened for business about Christmas 1862, and has since been used and occupied as a grocer's shop, in connection with the said dwelling-house of the said George Fullford, by the said Frederick George Fullford.

Later in the said month of November 1862, notice was given to the defendants, by direction of the said local board of health calling upon them to remove so much of the said erection as projected beyond the line prescribed to them by their said surveyor; and the defendants not having done so, on the 27th of January following another notice was given to the said defendants by the direction of the said local board, that an indictment would be preferred against them at the next Assizes for infringing the provisions of the Local Government Act (1858) Amendment Act 1861, by making the said erection without the consent of the said local board of health, and at the said Spring Assizes for the said county an indictment was accordingly preferred, and a true bill found by the grand jury against the said defendants.

The town of Fareham is a market-town, containing, according to the last census, a population of 6000 inhabitants. It lies on the main road between the towns of Portsmouth and Southampton, and is crossed by two turnpike roads, which constitute the public highways of the four principal streets of the said town, of which West-street is one.

Under the order in council before mentioned, a system of drainage and water supply has been introduced into the said town, and the Public Health Act has otherwise been put into full operation therein.

The turnpike-roads before mentioned are repaired by the turnpike trustees; that forming the West-street or highway in question under the before-mentioned acts of the 50 Geo. 3, c. 14, and 1 Will. 4, c. 61; but the local board of health *de facto* exercise jurisdiction over them so far as requisite for effectuating the general purposes of the Public Health Act, and over all the private property abutting on the said roads as part of the district of the said local board, but the defendants dispute their right so to do.

The public sewerage and water pipes are carried under West-street throughout its whole extent, and all the houses in the said street (the defendant's house included) are in connection therewith. The street is also lighted with public gas lamps. The words "West-street" are conspicuously painted on the houses at each end thereof, and the houses in the said street on both sides thereof are numbered. The said street has a raised footway on either side thereof, as shown on the model. The footway on the north side of the said street on which the defendant's house is situate, varies in width from nine to fourteen feet in different parts thereof, and is flagged about one-third of its whole extent, and has a curb-stone for two-thirds of its whole length, but immediately opposite to the defendant's house for some distance on either side, and in some other parts of the street, it has at present neither curb or flag-stone.

The said street contains a Market Hall, Trinity Church, two Dissenting Chapels, an institution hall, and charity school. All excepting Trinity Church are nearly a quarter of a mile distant from defendants' premises.

Upon the above facts I directed the jury to find the defendants guilty, and they were convicted; and I respited the judgments and admitted the defendants to bail, and reserve for the consideration of this Court the question whether the erection of the said shop and building by the defendants under the circumstances above mentioned comes within the prohibition contained in the 28th section of the statute 24 & 25 Vict. c. 61, upon which the indictment was framed.

WILLIAM ERLE.

The plan and model showed that the houses in that part of West-street where the defendants' house was situated, were all separate houses, with gardens to them both between the houses and highway, and also separating one house from another; that the houses were of different shapes and sizes, and had no reference to any common line of frontage, some being further from the highway than others.

The *Solicitor-General*, for the defendants.—The shop front was built on what was formerly a garden inclosed by a wall, and was about four feet from the footway. The 24 & 25 Vict. c. 61, s. 28, enacts that "it shall not be lawful within the district of any local board to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto

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beyond the front of such house or building on either side of the same, as aforesaid, without the previous consent of such local board. First, this was not a street. In the Public Health Act 1848, incorporated with the 24 & 25 Vict. c. 61, a street is defined by sect. 2,—“the word ‘street’ shall apply to and include any highway (not being a turnpike-road), &c.” In this case the road is a turnpike road, and it was intended to exclude such roads from the jurisdiction of the local boards, and to leave them under the jurisdiction of the turnpike trustees. And that this was intended, is further shewn by 21 & 22 Vict. c. 98, s. 41, which empowers local boards to enter into agreements with turnpike trustees as to the repair, &c. of roads and streets within their districts. [ERLE, C.J.—The definition of “street” in the 11 & 12 Vict. c. 63, has relation to sect. 68 of that act, which vests the property in the streets, &c. in the local boards, and sect. 4 shews that it was not intended to take the property in turnpike-roads out of the turnpike trustees.] In the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), s. 68, the phrase “house or building projecting beyond the regular line of street” is used. This is not a street, because the houses have gardens in front of them, and the houses are not all at an equal distance from the road. What is to regulate the length of the gardens in front of the houses so as to form a street? If houses with gardens of 20 feet only are in a street, why not houses with gardens of 100 yards in front of them? Again, the houses on the same side of the way are detached, each standing on its own land. [MELLOR, J.—Some houses like these have ground in front belonging to them, unfenced from the public way, on which the public can go: others have the ground in front fenced off, and on which the public cannot go. Is the same rule of construction to apply to both? It is clear the clause applies to houses only which do not come close up to the roadway. BLACKBURN, J.—It is difficult to say that Devonshire-house, in Piccadilly, forms part of the street.] This was originally a country road vested in trustees, and now the houses do not adjoin, but are detached, and are at irregular distances. [POLLOCK, C.B.—How could you apply the term “street” to such houses as Lord Wharncliffe’s, in Curzon-street, Mayfair; or Mr. Holford’s, in Park-lane? The projection in front of Sir John Soane’s Museum, Lincoln’s-inn-fields, was maintained, although it was said to be contrary to the provisions of the Metropolitan Building Act.] Independently of the statute, the defendants had a right to build on their own land, as they have done, and the words of the statute should be much more stringent than they are to take away such right.

Coleridge, Q.C. for the prosecutors.—I agree that it is only by the cogent words of some statute that a party is to be prevented from dealing with his own property as he pleases. In this case the defendants are prevented from doing so by the 24 & 25 Vict. c. 61, s. 28, which prevents them bringing forward their house or shop beyond the front wall of the house or building on either side

thereof. That does not mean the houses or buildings on either side "in a line therewith." Unless this place is not a street, the defendants have infringed the statute. The real question is, is this a street, or does the defendants' house form part of a street? [MARTIN, B.—Is this a question of fact or law?] It is a question of law. It is called West-street; but it is conceded the name is not conclusive. It is the ordinary access from the town to the railway-station. This is a highway in a town, and the object of the statute was to compel uniformity of line of buildings in towns. (The meaning of the word "street," as given in Johnson's, Webster's, and Richardson's dictionaries, was quoted.)

POLLOCK, C.B.—We are all of opinion that the question whether this was a street or not was a question of fact for the jury, which has not been determined by them, and therefore that this conviction cannot be sustained. I believe that all of us are not agreed as to whether this was a street or not. I and some of my Brothers think that it was not. Speaking for myself only, in my opinion, and as far as it is a matter of law on which it is necessary to give a direction to the jury, this set of detached houses, all of which were not in a continuous line, and had not an apparent continuous line, was not a street within the meaning of the act in question.

ERLE, C.J.—I am of the same opinion. The question is, what is the meaning of the word "street" in sect. 28 of 24 & 25 Vict. c. 61? I think the word "street" was meant to apply only to a row of houses in some degree continuous and proximate to one another; and I ought to have left the question to the jury, telling them that if in their opinion the houses had not that degree of contiguity and proximity that was necessary to constitute a street, they ought to have acquitted the defendants.

MARTIN, B.—I am of opinion this was of necessity a question of fact for the jury. In this case I am quite satisfied that this was not a street within the meaning of the Act of Parliament. It was a question of fact for the jury to determine on the best direction that the judge could give to the jury under the circumstances. In this case there is really nothing to guide them to the conclusion that it was a street. The name is not conclusive, for the old Watling-street in many parts had no houses. The question not having been left to the jury, I concur in thinking that the conviction cannot be sustained. I myself should have left the case to the jury, rather with the intimation that this was not a street.

BLACKBURN, J.—I am of the same opinion. I agree that this was a question of fact, whether, within the meaning of the 24 & 25 Vict. c. 61, s. 28, this house formed part of a street. Whether the houses and buildings on one side of a road are so continuous as to form a continuous road is a question of fact. In the present case I incline to think that they did, but still that was a question for the jury, on which they might have found either way consistently with the evidence.

MELLOR, J.—I am of the same opinion. I agree with my

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brother Blackburn, that if on the question of whether this street having been submitted to the jury they had found either way, I should not have been disposed to disturb the finding. The question really is, whether these houses were so near as to form a continuous row of buildings, and the question was really one for the jury, whether they formed a street or not.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

April 23, 1864.

(Before POLLOCK, C.B., MARTIN, B., BYLES, BLACKBURN, and MELLOR, JJ.)

REG. v. JAMES LEE AND ANOTHER. (a)

False pretences—Indictment—Particularity—Evidence.

The indictment charged that prisoners falsely pretended that two loads of soot which the prisoners then delivered weighed 1 ton 17 cwt., whereas they weighed but 1 ton 13 cwt., by means of which false pretence the prisoners obtained 8s.

The evidence was that a contract existed between prosecutor and prisoners for soot, which prosecutor was to buy at the rate of 38s. per ton. Deliveries were made from time to time, and payment was made according to the quantities pretended to be delivered. The prisoners put broken bricks and slack among the soot in their cart, and went to a public weighing machine, and got the whole weighed and a ticket of such weight given. Afterwards the bricks and slack were removed, and the cart with the soot in it taken to the prosecutor's and the soot delivered and the tickets presented and payment made by the prosecutor according to the weights specified in the ticket:

Held, that the indictment was sufficiently specific in form, and that the prisoners were indictable for obtaining money by false pretences.

CASE reserved for the opinion of this Court at the last Nottinghamshire Michaelmas Sessions.

The two prisoners were convicted of obtaining money under false pretences.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The indictment charged in the first count that the prisoners on the 20th August at Oxton did falsely pretend to one Joseph Burgess Thurman that two loads of soot which the prisoners then delivered to the said Joseph Burgess Thurman did together weigh 1 ton and 17 cwt., whereas in fact the said two loads of soot did not weigh together 1 ton and 17 cwt., but only weighed 1 ton 13 cwt., the said prisoners well knowing the said pretence to be false, by means of which false pretence the said prisoners obtained from the said Joseph Burgess Thurman 8*s.* with intent to defraud.

The second count charged, that the prisoners on the 20th August at Oxton did falsely pretend to one Joseph Burgess Thurman that three loads of soot, one of which said loads of soot the prisoners delivered to the said Joseph Burgess Thurman on the 17th August, and the remaining two loads of which soot the prisoners delivered to the said Joseph Burgess Thurman on the 20th August aforesaid, did together weigh 2 tons 11 cwt. 2 qrs., whereas, in fact, the said three loads of soot did not weigh together 2 tons 11 cwt. 2 qrs., but only weighed 1 ton 9 cwt., the said prisoners well knowing the said pretence to be false, by means of which false pretence the said prisoners obtained from the said Joseph Burgess Thurman 2*l.* 1*s.* with intent to defraud.

The prosecutor was a farmer. The prisoners were chimney sweepers, of whom the prosecutor had agreed to purchase soot at the rate of 1*l.* 18*s.* per ton.

On the 17th August the prisoner Lee delivered to the prosecutor a cart load of soot, and at the same time presented to the prosecutor a ticket of the alleged weight of the soot (14 cwt. 2 qrs.)

The soot was weighed and a ticket obtained at a public weighing machine, seven or eight miles distant from the prosecutor's residence.

Prosecutor paid Lee 1*l.* 7*s.* 6*d.* for that soot, believing there was 14 cwt. 2 qrs., as stated on the ticket.

On the 20th August both prisoners delivered to the prosecutor two loads of soot, and gave to the prosecutor two tickets of the alleged weight of such two loads.

The soot was weighed, and the tickets obtained at the same weighing machine as before. The weight of one load was stated on the ticket to be 17 cwt. 2 qrs., and the weight of the other load was stated on the other ticket to be 1 ton 1 qr., and the prisoner Lee said those were the weights of the two loads.

The prosecutor then paid the prisoners for the two loads of soot according to the weight stated in the two tickets, believing those weights to be correct.

The two loads of soot were then put to the first load of soot bought on the 17th August, the prosecutor not then having suspicion of any fraud having been committed, but in a few hours afterwards, in consequence of information received by the prosecutor, the three loads of soot were weighed by him, and the three loads together were found to contain only 1 ton 9 cwt., being 1 ton 2 cwt. 2 qrs. less than the weight represented by the pri-

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soners to be contained in the three loads, and 8 cwt. less than the weight represented to be contained in the last two loads last delivered.

The price of 1 ton 9 cwt. would have been only 2*l.* 17*s.* The price of the three loads, at the weight pretended by the prisoners, was 4*l.* 18*s.*, and that sum was actually paid by the prosecutor to the prisoners. The price of the two loads last delivered at the weight pretended by the prisoners was 3*l.* 10*s.* 6*d.*, which sum was paid by Mr. Thurman to the prisoners on the 20th August.

The three tickets were produced by the prosecution during the trial, and put in evidence.

It was proved on the trial that three loads of what appeared to be soot were weighed by the prisoners at the machine mentioned in the tickets, and that the weights represented on the tickets were the weights of the three loads at the time they were weighed.

It was also proved that between the time of weighing the last two loads of soot at the machine and the delivery of the soot to the prosecutor, the prisoners had, during the transit, removed from the carts in which what appeared to be soot was conveyed, three bags full of broken bricks and wet coal slack, weighing upwards of 4 cwt., and which was in the carts when the loads were weighed; and that, between the weighing machine and prosecutor's premises was a distance of several miles; so that therefore the prisoners had ample opportunity of removing other soot from the cart without being observed.

Upon their arrest the prisoner Lee said, in allusion to the bags of bricks and coal slack, "We were taking those bags to a man's garden at Carrington, and we forgot to leave them;" but no evidence was offered in support of this statement, nor, except as aforesaid, was any explanation given of the deficiency between the soot delivered and the weight mentioned on the tickets.

The prisoner's counsel objected to the indictment that it did not sufficiently set forth the false pretence: that it ought to have set forth the fact that the soot was weighed and tickets were given; that it ought to have set forth the contents of the tickets, and then ought to have alleged that the false pretence was the production of the tickets. Prisoner's counsel also objected that it was not an offence under the statute to cheat by false representation of the weight of the soot.

The Court overruled the objections, and held that it was an offence within the statute, that the false pretence was sufficiently set forth in the indictment, and that the tickets were only matters of evidence, and that it was not necessary to set them out in the indictment.

The jury found the prisoners guilty, but the prisoner's counsel requested a case for the Court above.

The Sessions respited judgment and discharged the prisoners upon their own recognisances.

The questions left for the consideration of the Court for Crown Cases Reserved are,

First, is the false representation of the weight of the soot a false pretence within the statute?

And if so, secondly, is that pretence sufficiently set forth in the indictment?

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Yeatman for the prisoner.—The conviction cannot be sustained. First, the indictment is insufficient for not alleging that the ticket was used as a false pretence. It must be shown what the false pretences are by which the property is obtained: (*Rex v. Mason*, 1 T. R. 581.) So in *Rex v. Munoz* (2 Stra. 1127) it was held necessary to specify the false tokens in the indictment by which the property was obtained. The ticket was the inducement to the prosecutor to part with his money. [MELLOR, J.—The ticket is only the means of proof—the false assertion is the same.] Secondly, assuming the indictment good, no offence was proved. This was an ordinary case of buying and selling, in which the seller gave short weight. That is not indictable: (*Reg. v. Eagleton*, 6 Cox Crim. Cas. 559.) [MARTIN, B.—Not so. At the time of the delivery of the soot a ticket is presented, which truly specifies what was the weight of the cart at the weighing machine, but then that was made up partly by broken bricks and slack, and the prisoners pretended that it was all soot, and the ticket was used to vouch that false pretence.] (*Rex v. Reed*, 7 C. & P. 848, was then cited.) [BLACKBURN, J.—That was overruled by *Reg. v. Sherwood* (7 Cox Crim. Cas. 270)(a), from which the present case cannot be distinguished.] In this case the prosecutor got a quantity of soot in respect of his contract, but not all the weight that he was entitled to. This is not a case of false pretences such as was contemplated by the statute.

Cave, for the prosecution, was not called upon to argue.

POLLOCK, C.B.—We are all of opinion that the indictment is good, and that the evidence supports the indictment. The objection to the indictment is not well founded. The indictment states the offence in the words of the statute, and it is not necessary to state more than the general nature of the offence as it is here stated. The case of *Reg. v. Sherwood* is in point. As to mere false representations in buying and selling, and in the course of bargaining, it was not the object of the Legislature to make them the subject of indictment for false pretences. But in this case, though a bargain was made in the first instance, yet by a subsequent device the buyer was imposed on by the seller as to the quantity of soot delivered, and that was the subject of indictment. The conviction will therefore be affirmed.

(a) In *Reg. v. Sherwood* it was held that a prisoner was properly convicted on an indictment for false pretences, it being proved that the prisoner, after having agreed with the prosecutor to sell and deliver a load of coals at a certain price per cwt., falsely and fraudulently pretended that the quantity which he had delivered was 18 cwt., and that it had been weighed at the colliery, and the weight put down by himself on a ticket, which he produced, as knowing it to be 14 cwt. only, and thereby obtained an additional sum of money.

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MARTIN, B.—I am of the same opinion. There can be no doubt in this case on the second count of the indictment, which states precisely what the circumstances were. It is true that the weight of the soot was vouched by a ticket, but that was used only to confirm the prisoner's statement, while in reality it was merely a lie, with a representation that such was the weight of the soot, whereas, in fact, the weight was made up with bricks. It was not necessary to mention the ticket in the indictment, for that was merely matter of evidence of the false pretence by which the money was obtained. This is a clear case.

The rest of the Court concurring,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 23, 1864.

(Before POLLOCK, C.B., MARTIN, B., BYLES, BLACKBURN and MELLOR, JJ.)

REG. v. LANGMEAD. (a)

Indictment—Larceny and receiving—Recent possession—Evidence.

It is a presumption of fact, and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing, or of feloniously receiving, has been committed. Where an indictment contains counts for larceny and receiving, unless the evidence excludes the probability of one or the other offence having been committed, the case should be left to the jury on both counts.

CASE reserved for the opinion of this Court at the General Quarter Sessions of the Peace, held at the Castle of Exeter, in and for the county of Devon, on the 23rd Feb. 1864.

James Langmead was indicted and tried for :

1st count. Stealing at Belston, on the 22nd December 1863, four wether sheep, two ewes, and six sheep, of the goods and chattels of George Glanfield.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

2nd count. Feloniously receiving the said sheep, knowing them to have been stolen.

The following is the material part of the evidence taken at the trial:—

George Glanfield, farmer, at Belstone.—Has a right of common on Belstone-common. Had sixty-one sheep on the common in the month of December last. About a fortnight before Christmas-day I saw all my sheep but two on the common. About Thursday or Friday after Christmas-day I went to see my sheep, and found all except thirteen. On the 3rd February I went to Collypriest, Mr. Bond's farm; saw twenty-one sheep there of the Dartmoor breed. I examined them and was certain there were four of mine there. I went again on the following Tuesday. Examined the flock again, and then found six of my sheep, two ewes and four wethers (including the four).

John French, servant.—Living with Mr. Langmead. He kept a car just before Christmas. He has two sons, one about twelve, the other about eight. One morning in Christmas week he told me to get the car. I got the car and went with my master and his two sons as far as Sticklepath. Went through Mr. Reddaway's court to get to the road, and came out in the road about two miles from Okehampton, about one mile and a half from Sticklepath. When we came to the turnpike-road we went on to the head of Sticklepath, and then I went back again. We did not go into the village; I went within about a gunshot.

Elizabeth Wills.—I live at Sticklepath. The house I occupy joins the high road. I was out of my bed and saw a flock of sheep going through the village, driven by two boys. I cannot say who they were. My impression was that they were Mr. Langmead's boys. It was before Christmas, and bright moonlight. It was early in the morning; I cannot tell at all what time.

Cross-examined.—It is a common thing for sheep to be driven through Sticklepath. I cannot say whether it was a month before Christmas.

John Hunt.—In employment of Mr. William Smith, cattle dealer.—On the 23rd December I went to the King William Inn, about a mile from Exeter, at seven o'clock in the morning, in consequence of directions given by my master. I saw that no sheep had passed, and then I went to the Okehampton-road half-a-mile, and there I met a boy with a flock of sheep—twenty-one. I spoke to the boy, and having spoken to him I drove the sheep back to the inn and went into the public-house. I first saw prisoner outside the public-house; another boy was with him. Both boys had breakfast. One of the boys is here now [points him out in court]. That is the boy that drove the sheep. I put the sheep into a lane by the roadside, and then went into the inn. The sheep seemed weary with travelling. I know Sticklepath; that must be seventeen or eighteen miles from Exeter. Prisoner said, before he went into Little John's Cross Inn, he should like to see what keep or food the sheep had. After breakfast I went to a field, into which Mr. Smith directed the sheep to be put. The prisoner went with me. It lies a mile towards Exweek. I told prisoner he was to meet my master at the Swan Inn, at St. Thomas's, in the evening. When I went to the field I turned the sheep in. The prisoner and the two boys went with me.

John Lewis, innkeeper, King William Inn, at Little John's Cross.—Knows the prisoner; has known him for some time. He came to my house at eight o'clock on the 23rd with his youngest boy in a car. He

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put the horse in the stable, and ordered breakfast for himself and two boys : "I want breakfast for myself and two boys." After he had arrived there about ten minutes or a quarter of an hour, the second boy came. He said he had sheep coming along the road, and he wished to stop them in the yard till he got keep for them. I refused, because I thought they would trespass on my garden. Prisoner said they were much tired ; they would soon lay down. He had his breakfast with his two boys, and then left the house.

William Smith, cattle dealer.—Recollects receiving a letter from the prisoner on the 22nd December. I have missed it. Mr. Langmead wrote me he should have some sheep coming on ; he would be early at Little John's Cross, at the King William Inn. He said, if I could not be there to deal for them, I was to send some person to show where to put the sheep in my field. I was going somewhere, and could not be there that morning, and sent Hunt. Between six and seven in the evening, on the 23rd, I went to the Swan Inn at St. Thomas's, and there saw prisoner. I believe I said, "Where are the sheep?" to Mr. Langmead. He said, "They are up in your field. What shall you charge me for the keep of them?" I spoke short. I said, "Nothing at all. If you don't sell them you can keep them." I said, "What—have you sold them?" Prisoner said, "No ; I have had a very good offer for them." I went with him to my field. I did not count the sheep. Prisoner said there were twenty-one. He said there were two ewes, and I took for granted the remaining sheep were wethers. He said, "You shall have them for 33*l.* 10*s.*" We returned to the house, and I gave him the money. He told me he had bought a portion of them.

Alfred Bond.—Resides at Colly-priest farm, Tiverton. On the 8th January I purchased sheep of Mr. William Smith. Purchased twenty-one. Sent them home to the farm. They were Dartmoor sheep, redded over the backs and sides. In the beginning of February police constable Harris came. I told him where to go to find the sheep. Some days after, on a Tuesday, Harris, the prosecutor, Reddaway, and Eadacott came. They did not take the sheep. They remained in my possession till after I had been to North Tawton. Then I gave them to Harris.

The prisoner's counsel, at the close of the case for the prosecution, submitted to the Court that there was not sufficient evidence to go to the jury, but the Court decided that there was, and after reading through the evidence by the Chairman, the whole case was left to the jury.

The jury found the prisoner guilty of feloniously receiving the sheep, knowing them to have been stolen.

Whereupon the counsel for the prisoner objected that there was no evidence before the Court to support the second count, and that the jury should have been directed that they could not find the prisoner guilty on that count, for (he contended) the evidence proved no more than recent possession by the prisoner after the loss unaccounted for, and that although a presumption of guilt might legally be inferred from recent possession unaccounted for alone, if the offence of which the jury found the prisoner guilty had been theft, yet that guilt could not be inferred from recent possession unaccounted for alone, in considering whether the prisoner

lty of feloniously receiving the sheep, knowing them to be stolen. The Court were of opinion that there was not evidence to support the verdict, but at the request of the prisoner's counsel they granted a case on the following question, whether upon the whole case the jury should have been directed that they could not lawfully find the prisoner guilty upon the second

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prisoner was sentenced to four years' penal servitude.

B. ANDREWS, Chairman.

for the prisoner.—There was no evidence that ought to be left to the jury on the count for receiving. Recent possession of stolen property is not evidence of felonious receiving; if there is anything, it is evidence of stealing. [MELLOR, J.—The evidence of Elizabeth Wills, that she saw the sheep driven by the prisoner, and that her impression was that they were the prisoner's sheep, is merely some evidence (whatever its value may be is a question) for the jury upon the count for receiving.] Recent possession raises the presumption that the prisoner stole rather than that he received them. The evidence of Elizabeth Wills came to nothing, for she could not say when it was that she saw the sheep driven by two boys, and that it might have been a month before Christmas. It is necessary to infer different conditions in the case of receiving than of stealing—in the latter case you must infer (1) that the things were stolen by the prisoner; (2) that the prisoner received them; (3) that they were the same things; and (4) a receiving with guilty knowledge. Mere recent possession does not in this case enable you to infer that those things. In 2 Russ. on Crimes, 247, it is said: "In an indictment for receiving stolen goods there should be evidence to show that the goods were in fact stolen by some other person, and recent possession of the stolen property is not sufficient to support such an indictment, as such possession is evidence of stealing and not of receiving." (*Rex v. Oddy*, 6 C. & P. 399; *Rex v. Oddy*, 2 Den. C. C. 264, 6 Cox. 210). Alison's "Principles of the Law of Evidence" is referred to.

LOCK, C.B.—We are all satisfied that the Chairman could have withdrawn the case from the jury on the count for feloniously receiving the sheep, nor have given them a direction that there was no evidence of felonious receiving by the prisoner. The distinction between the presumption as to felonious receiving and as to receiving is not a matter of law. No doubt, upon the evidence, no person other than the prisoner appears distinctly to enter into the sheep-pen, and all that appears is that the prisoner was found very near the sheep in possession of the stolen sheep. That *prima facie* is evidence of stealing rather than of receiving; but in no case can it be said to be exclusively such unless the party is found so near the sheep in possession of stolen property, and under such circumstances as to exclude the probability of receiving—as where a

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party is stopped coming out of a room with a gold watch which has been taken from the room; but if he has left the room so long as to render it probable that he may have received it from some one else, then it may be evidence either of stealing or of felonious receiving. In the present case, I think that the evidence of receiving was more cogent than that of stealing. It is very likely that the prisoner sent the two boys to drive the sheep, and that they had innocently taken them from some one else who had stolen them from the common.

MARTIN, B.—I am of the same opinion. The question is, if the indictment had contained a count for feloniously receiving only, could the chairman have stopped the case from going to the jury? I think clearly not. It is utterly impossible to say that there was not *some* evidence from which the jury might have inferred that the prisoner's two sons stole the sheep, and that the father received them. No doubt, the jury believing it to be the more lenient course to find the verdict of feloniously receiving, acted accordingly.

BYLES, J.—I am of the same opinion. There are several grounds on which this verdict may be sustained. The prisoner might have been guilty of receiving the sheep if the two boys had stolen them. That was a possible case on the evidence. Again, he might have sent the two boys as innocent agents to get them from another person who had stolen them. Thirdly, the two boys may be looked upon as guilty agents in receiving, and the prisoner treated as an accessory before the fact, which would render him liable to be tried for a substantive felony. This is like the case of a burglary in which a woman is concerned who is found dealing with the property stolen, in which case it is for the jury to determine in what character she is criminally liable.

BLACKBURN, J.—I am of the same opinion. As a proposition of law, there is no presumption that recent possession points more to stealing than receiving. If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily he is reasonably presumed to have come by it dishonestly, but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property, the presumption is that he received it. In the present case, I believe that the jury have drawn the right conclusion.

MELLOR, J.—I am of the same opinion. In this case I think that there was evidence on which the jury might have come very fairly to the conclusion either of stealing or receiving.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 23, 1864.

(Before POLLOCK, C.B., MARTIN, B., BYLES, BLACKBURN, and MELLOR, JJ.)

REG. v. MARY SENIOR. (a)

*Perjury—Jurisdiction—Sunday beer trading—Prohibited hours—
11 & 12 Vict. c. 49.*

To an indictment for perjury, on the hearing of an information before justices, under the 11 & 12 Vict. c. 49 for keeping open an inn for the sale of beer to persons not being travellers, before half-past twelve o'clock on Sunday afternoon, it was objected by counsel that the justices had no jurisdiction, and that the 11 & 12 Vict. c. 49 was repealed, and for this Whiteley v. Heaton (27 L. J. 217, M.C.) was cited: Held, on the authority of Harris v. Jenns (3 L. T. Rep. N.S., 408), that the 11 & 12 Vict. c. 49 was not repealed, and therefore that the justices had jurisdiction.

CASE stated for the opinion of this Court by E. F. Price, Esq., Q.C., sitting as Commissioner at the Yorkshire Lent Assizes 1864.

This case was tried before me, sitting as Commissioner for Byles, J., at the last York Assizes. The prisoner was indicted for wilful and corrupt perjury alleged to have been committed upon the hearing of an information before justices sitting in petty sessions.

The information, of which the following is a copy, was laid against one Thomas Sellers under the statute 11 & 12 Vict. c. 49, s. 1:—

“Borough of Wakefield, in the West Riding of Yorkshire.—Common information.

“The information of James McDonnold, of Wakefield, in the West Riding of the county of York, chief constable, taken before the undersigned, one of Her Majesty's Justices of the Peace, in and for the said borough in the West Riding of the county of York, the 13th February, 1864.

“That Thomas Sellers, on Sunday, the 7th February instant, at the borough of Wakefield, in the said Riding, was licensed to keep his house

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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as an inn there, and did open his house there for the sale of beer therein to persons not being travellers, before half-past twelve o'clock in the afternoon, contrary to the statute in that case made and provided.

"Taken before me, Samuel Holdsworth." "JAMES McDONNOLD.

At the close of the case for the prosecution it was objected by Mr. Campbell Foster, for the prisoner, that there was no jurisdiction in the Justices to hear the information under the statute above-named; and he further contended that the statute, 19 & 20 Vict. c. 118, was the only statute now in force limiting the hours during which public-houses, beer-houses, &c., should be open for the sale of liquor, and that this latter statute had, in effect, repealed the 11 & 12 Vict. c. 49, under which the information was laid, and that it is no offence to sell beer, &c., during any part of the forenoon of Sunday. Mr. Foster relied on the case of *Whiteley v. Heaton* (27 L. J. 217, M.C.)

I overruled the objection and left the case to the jury, who convicted the prisoner, and she was sentenced to three month's imprisonment, but allowed to be on bail until the opinion of the Court for Crown Cases Reserved could be obtained.

I reserved a case for the opinion of the Judges, as to whether my ruling was right that the 11 & 12 Vict. c. 49 is still in force, and that it is an offence to keep open a public-house for the sale of liquor during the hours prohibited by sect. 1 of the latter statute, and therefore that the jurisdiction in the magistrates to hear the information was sufficiently established.

E. F. PRICE.

No counsel were instructed on either side.

MARTIN, B.—The Court has been referred to the case of *Harris v. Jenns* (30 L. J. 183, M. C.; 3 L. T. Rep. N.S. 408), in which it was pointed out that my brother Bramwell could not have intended what he is reported to have said in *Whiteley v. Heaton* viz., that the 11 & 12 Vict. c. 49, was repealed by the 17 & 18 Vict. c. 79. *Harris v. Jenns* decides that the 11 & 12 Vict. c. 49 is still in force, and therefore the justices had jurisdiction to hear the information in this case; and the conviction is good.

Conviction affirmed.

COURT OF CRIMINAL APPEAL

April 30, 1864.

(Before POLLOCK, C.B., BLACKBURN, KEATING, and
MELLOR, JJ., and PIGOTT, B.)

REG. v. FRETWELL. (a)

*Felony—Shooting into a crowd—Unlawful wounding—24 & 25 Vict.
c. 100, s. 18.*

A person who fires a loaded pistol at a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and severely wounds one of the group, may be indicted and convicted for the felony of feloniously shooting and wounding the person injured with intent to do grievous bodily harm.

CASE reserved for the opinion of this Court by Byles, J.

The prisoner was indicted for feloniously shooting at Hirats Lawton, with intent to do grievous bodily harm to Hirats Lawton, and tried before me at the last York Assizes.

The prisoner had been assaulted and annoyed by several young men, among whom was the prosecutor. Immediately afterwards these young men were standing together in a group of about fifteen persons. The prisoner drew a pistol from his pocket and fired into the group. The prosecutor received some severe shot wounds in his neck and chin.

The jury found that the prisoner did not aim at the prosecutor, or at any one else in particular, but that he fired into the group, intending generally to do grievous bodily harm, and so unlawfully wounded.

Judgment was postponed, and the prisoner remains in custody, the question being

Whether, on this finding, the prisoner be guilty of the felony charged in the indictment, or of the misdemeanor only? (See

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Reg. v. Smith (b) Dears. C. C. 559; 7 Cox Crim. Cas. 5; and the cases cited.

J. B. BYLES.

No counsel appeared on either side.

By the COURT.—The prisoner might very properly be convicted of the felony.

Conviction affirmed.

(b) *Reg. v. Smith*.—If A. intending to murder B., shoots at and wounds C, supposing him to be B., he is guilty of wounding C. with intent to murder him, for he intends to kill the person at whom he shoots.

COURT OF CRIMINAL APPEAL.

April 30, 1864.

(Before POLLOCK, C.B., BLACKBURN, KEATING, and
MELLOR, JJ., and PIGOTT, B.)

REG. v. HENSHAW AND CLARK. (a)

Indictment—False pretences.

An indictment for obtaining money by false pretences alleged that prisoners pretended to P., who lived at T.'s and acted as T.'s representative, that C. had come from London to the residence of H., and that P. was to give C. 10s., and that T. was going to allow C. 10s. a-week for the benefit of his health:

Held, that the indictment did not state with sufficient certainty a false pretence of an existing fact.

CASE reserved for the opinion of this Court by the Recorder of Brighton.

At the General Quarter Session of the peace for the borough of Brighton, holden on the 19th March, 1864, Lewis Henshaw and John Clark were tried before me upon the following indictment:—

Borough of Brighton } The jurors for our Lady the Queen, upon
to wit. } their oath present, that Lewis Henshaw and John Clark, on the 14th day of January, 1864, unlawfully, knowingly, and designedly did falsely pretend to one Henrietta Pond, who then lived at one Madam Temple's, and acted as her representative, that the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

said J. Clark had come down from London, to the residence of the said L. Henshaw, and that the said H. Pond was to give him 10s., and that the said Madam Temple was going to allow the said J. Clark 10s. a week for the benefit of his health. By means of which false pretence the said L. Henshaw and J. Clark did then attempt unlawfully to obtain from the said H. Pond the sum of 10s. with intent to defraud. Whereas in truth and in fact the said H. Pond was not to give the said J. Clark the sum of 10s. or any other sum of money, and whereas in truth and in fact the said Madam Temple was not going to allow the said J. Clark the sum of 10s. a-week, or any other sum of money, for the benefit of his health, as they the said L. Henshaw and J. Clark well knew at the time when they did so falsely pretend as aforesaid, against the form of the statute in such case made and provided.

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The facts of the case, so far as they are material to the point reserved, were as follows:—

On the 15th January last, in the evening, the two prisoners went together to the shop of Madam Temple in Brighton. She has also a shop in London. After Henshaw, in the presence and hearing of Clark, had made a statement to one of Madam Temple's assistants, he requested to see the one of the assistants who kept the accounts. H. Pond, being the person by whom the accounts of Madam Temple's establishment are kept, then came forward.

Her evidence was, that Henshaw, in the presence and hearing of Clark, said: "This young man (meaning Clark) has come down from London; that he (meaning Clark) had been in the Brompton Hospital with a bad leg; that he (meaning Clark) had seen Madam Temple in London; that Madam Temple said that I (H. Pond) was to give him (meaning Clark) 10s. a-week while he was at Brighton for the benefit of his health." I refused to do so, saying that if Madam Temple wished me to do it she would send me a letter the next morning. Once or twice Henshaw said, "You do not intend to give the 10s." Henshaw said to Clark, "Was that what Madam Temple said?" Clark said, "Yes." Henshaw then said that he would write to Madam Temple, and the prisoners went away together.

Madam Temple was called, and denied ever having seen or having any knowledge of either of the prisoners. The counsel for the prisoners objected that the indictment alleged no false pretence of an existing fact, and negatived no false pretence of an existing fact, all the facts alleged and negatived being future.

I held that the false pretence that the said H. Pond was to give him 10s. was a sufficient false pretence of an existing fact to support the indictment, and that the second false pretence, even if not of an existing fact, might therefore be taken into consideration in conjunction with the first false pretence, but reserved the point for the Court of Criminal Appeal.

The jury found both prisoners guilty, and they were sentenced by me to four calendar months' imprisonment, with hard labour, and were committed to the House of Correction at Lewes in execution of that sentence.

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The question for the opinion of the Court of Criminal Appeal is, whether upon this indictment the said conviction was right?

JOHN LOCKE,
Recorder of Brighton.

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—Indictment. *Conolly* for the prosecution.—The indictment shows sufficiently a false statement of an existing fact. [POLLOCK, C.B.—What is the existing fact alleged?] That Madam Temple had said that Pond was to give Clark 10s. a-week whilst he was at Brighton. [POLLOCK, C.B.—That is not so laid; the averment is that Pond was to give him 10s., and that Madam Temple was going to allow him 10s. a-week. Now if I say that I am a member of Parliament and am not, that is a false pretence; but if I say I expect to be made a Peer, that is no false pretence.] In one sense the act to be done must always be future, for the result of the false pretence, the obtaining of the money, is necessarily so. The averment that Pond was to give Clark 10s. is the statement of an existing fact. [PIGOTT, B.—Does it not require the words “by her authority” to make the statement sufficient? BLACKBURN, J.—The case of *Reg. v. Archer* (6 Cox Crim. Cas. 515) is the nearest in your favour. Here the prisoners do pretend that Clark was in some way connected with Madam Temple.] The case of *Reg. v. Fry* (1 Dears. & B. 449; 7 Cox Crim. Cas. 394) was then cited. Here the substance of the thing is a pretended conversation with Madam Temple, which never took place.

No counsel appeared for the prisoner.

POLLOCK, C.B.—The majority of the Court are of opinion that the indictment does not state with sufficient certainty any false pretence, within the rule that requires that an existing fact shall be alleged as the ground of the false pretence. Very likely some speculation may be formed from this indictment as to what the false pretence was, but the majority of the court do not think that it is stated with sufficient certainty.

BLACKBURN, J.—I agree with the Lord Chief Baron, that the false pretence by which the money was attempted to be obtained should be stated with sufficient certainty. Speaking for myself only, I should say that, when it is alleged, as here, “that Madam Temple was going to allow John Clark 10s. a-week,” the averment is to be construed and understood in the sense and meaning that Madam Temple had expressed such an intention at a previous time, and that Pond was to give 10s. on her account, and therefore that it is a sufficient statement of a false pretence of an existing fact. If the count had stated the facts according to the evidence there could have been no doubt that a sufficient false pretence would have been stated. Although I doubt, I concur in the judgment of the Court, and do not require the case to be argued before the fifteen judges.

PIGOTT, B.—I entertain considerable doubt whether there is a statement in the indictment of a false pretence of an existing fact.

MELLOR, J.—Upon the whole, I agree with the Lord Chief

Baron, that the false pretence is not, according to the rules of criminal pleading, alleged with sufficient certainty.

KEATING, J.—I agree that the statement in the indictment is susceptible of the construction put upon it by my brother Blackburn, but I do not think that the indictment states it with convenient certainty.

POLLOCK, C.B.—In consequence of what has fallen from my brother Blackburn, I wish to add that, if the averment is susceptible of the meaning he has put upon it, it ought to have been left to the jury to say whether the words made use of by the prisoner did really mean that which would make it a criminal offence, and that the judge ought not to take upon himself to say that such was their meaning.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

April 30, 1862.

(Before POLLOCK, C.B., KEATING, BLACKBURN, and
MELLOP, JJ., and PIGOTT, B.)

REG. v. PARKER AND SMITH. (a)

*Night poaching—Commencement of prosecution—Evidence—
Information.*

On the trial of an indictment for night poaching, under the 9 Geo. 4, c. 69, ss. 4, 9, it is not sufficient to produce the warrant only under which the prisoners were apprehended, for the purpose of proving that the proceedings were commenced within twelve months of the commission of the offence, but the information in writing should also be produced.

CASE reserved for the opinion of this Court by Pigott, B.

The prisoners were indicted for night poaching to the number of three or more, being armed with offensive weapons, under the 9 Geo. 4, c. 69, s. 9.

The indictment was in the following form, viz. :

Gloucestershire.—The jurors for our Lady the Queen, upon their oath

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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present, that Henry Parker and Thomas Smith, and certain other persons to the jurors aforesaid unknown, being to the number of three and more, together, on the 26th of January, 1864, with force and arms, at the parish of Temple Ginting, in the county of Gloucester, by night (that is to say), about the hour of eleven, in the night of the 26th January, in the year aforesaid, unlawfully together did enter into, and then and there were in certain land there situate, in the occupation of Isabella Talbot and another, with the intent and for the purpose of then and there by night as aforesaid, illegally taking and destroying game and rabbits there, the said Henry Parker and Thomas Smith, and the said other persons, being then and there by night as aforesaid, and at the time when they so together entered and were in the said land as aforesaid, armed with guns and bludgeons, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and dignity.

The second count did not materially vary.

The evidence showed that the offence was, in fact, committed on the 26th January 1861, and to prove that proceedings were commenced within the time required by the 4th section of the statute, viz., twelve months from the time of the offence, the warrant under which the prisoners were apprehended was put in evidence, dated February 5th, 1861.

The following is a copy of the same :

To the constables of the Gloucestershire Constabulary Force and to all other peace officers of the said county of Gloucester.—Whereas, information hath this day been laid before the undersigned, one of Her Majesty's Justices of the Peace in and for the said county of Gloucester, by Richard Fluck, of Temple Ginting, in the said county, gamekeeper, for that Thomas Smith and Henry Parker, of Chipping Campden, labourers, on the 26th of January, 1861, at Temple Ginting aforesaid, together with divers other persons unknown, to the number of three or more, together, about the hour of eleven in the night of the same day, they being then respectively armed with a gun, did then, together, unlawfully enter a certain close of land then in the occupation of the Misses Isabella and Jane Elizabeth Talbot, there situate, and were then by night as aforesaid, and armed as aforesaid, in the said land, for the purpose therein, of taking and destroying game contrary to law ; and oath being now made before me, substantiating the matter of such information ; these are, therefore, to command you in Her Majesty's name forthwith to apprehend the said Thomas Smith and Henry Parker, and bring them before some one or more of Her Majesty's Justices of the Peace in and for the said county, to answer to the said information, and to be further dealt with according to law.

Given under my hand and seal, the 5th February, 1861, at Sudley Castle, in the said county.

JOHN C. DENT (L.S.)

It was proved that Mr. John Dent was, when he signed the warrant, a magistrate of the county.

No information was given in evidence ; and the respective arrests took place, of Smith on the 27th November 1862, and of Parker on the 14th January 1864.

The counsel for the prisoners objected—

First, that the warrant without the information was no legal evidence that proceedings were commenced within twelve months, as required by the statute; and secondly, that the present indictment was defective for not containing an allegation that such proceedings were in fact taken.

I overruled both objections, but reserved the points for the Court of Criminal Appeal.

The prisoners were convicted and sentenced.

If the Court should be of opinion that the warrant without the information is not sufficient evidence of the commencement of the proceedings, or that the indictment is defective for the cause above stated, in either case a verdict of not guilty is to be entered.

G. PIGOTT.

Harrington, for the prisoners.—It is submitted that this conviction cannot be sustained, on two grounds: first, because the indictment is bad upon the face of it; and secondly, because there was no sufficient evidence of the commencement of the prosecution within twelve months after the commission of the offence. The 9 Geo. 4, c. 69, s. 4, enacts that the prosecution for every offence punishable upon indictment or otherwise than upon summary conviction by virtue of that Act, shall be commenced within twelve calendar months after the commission of such offence. And sect. 9 enacts that any persons to the number of three or more by night unlawfully entering on any land for the purpose of taking game or rabbits, any of such persons being armed with any gun, &c., shall be guilty of a misdemeanor. Now the record of this indictment, when properly drawn up, will show that the proceedings were not commenced within twelve months after the offence, for it will appear thereon that the offence was committed on the 26th January 1861, and that the indictment was not preferred and found until the Lent Assizes 1863. The court will take notice of the dates in the indictment. If A. be indicted of murder or manslaughter, as well the day and place of the stroke or other act done inducing death, as of the death, must be expressed: (2 Hale P. C. 179.) [MELLOR, J.—It was formerly necessary to show that the offence was complete.] So in this case it is contended that it is necessary to show on the face of the indictment that the proceedings were commenced within a year. In the case of *Reg. v. Brooks* (2 Car. & K. 402; 2 Cox Crim. Cas. 436), and *Reg. v. Austin*, (1 Car. & K. 621), the question arose upon the facts, and it does not appear what the forms of the indictment were. [BLACKBURN, J.—This question is singularly like the Statute of Limitations, which has never been negatived, in stating the cause of action in the declaration.] In *Rex. v. Lookup*, (3 Burr. 1901), where an indictment stated the offence to have been committed in the time of the late King, and concluded against the peace of the now King, it was held insufficient on a writ of error. [MELLOR, J.—In the last edition of Archbold's Crim. Plead. this seems to be treated,

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not as a matter of averment in the indictment, but of proof upon the evidence. BLACKBURN, J.—Since the 8 & 9 Will. 3, c. 26, it has never been the practice to allege in prosecutions for coining, the offence to have been committed within three months.] As to the second objection, that there was no proper evidence of the commencement of the prosecution within twelve months: in *Wallace's* case (East P. C. 186), it appears to have been held by the judges that the information and proceeding before the magistrate was the commencement of the proceedings in coining cases. In all the reported cases the prisoners were in custody, and had been apprehended within twelve months of the time of the trial. The mere issuing of a warrant for the apprehension of the prisoners is not a commencement of the prosecution within the meaning of this statute, without apprehending them and bringing them before the magistrates: (*Reg. v. Hull*, 2 Fos. & Fin. 16; *Reg. v. Smith*, 1 L. & C. 131). The form of the warrant in this case shows that there must have been a previous information in writing, and that information should have been produced to show the commencement of the proceedings. [PIGOTT, B.—You contend that the warrant is merely secondary evidence of the information?] Yes. Paley on Convictions, by Macnamara, is to the same effect. The case of *Reg. v. Massey* (32 L. J. 21, M.C.), was then cited.

No counsel was instructed for the prosecution.

POLLOCK, C. B.—We are all of opinion that it was necessary in order to sustain the prosecution to give the information in evidence, and that therefore this conviction fails.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

April 30, 1864.(Before POLLOCK, C.B., KEATING, BLACKBURN, and
MELLOR, JJ., and PIGOTT, B.)

REG. v. HEYWOOD AND OTHERS. (a)

*Pleading—Indictment for three larcenies—24 & 25 Vict. c. 95, s. 5.**In indictment against a prisoner for three larcenies from the same prosecutor need not contain an averment that they were committed within a period of six months :*

CASE reserved for the opinion of this Court by the Recorder of Bolton (Lancashire).

At the Court of Quarter Sessions of the Peace for the borough of Bolton, in the county palatine of Lancaster, holden by me as Recorder of the said borough on the 31st March 1864, James Heywood, John Wood, Isaac Broughton, George Robinson, and Edward Kippax were tried before me on the indictment set forth below, and the jury by their verdict found J. Heywood and J. Wood guilty of stealing, and I. Broughton and G. Robinson guilty of feloniously receiving, and Edward Kippax not guilty, after a trial which lasted two days.

Borough of Bolton } The jurors for our Lady the Queen upon their
to wit. } oath present, that James Heywood on the 1st
September, 1863, at the borough aforesaid, and within the jurisdiction
of this Court, was servant to Augustus Warrens and another, and that
he said J. Heywood afterwards, and whilst he was such servant to
he said A. Warrens and another, to wit, on the day and year afore-
said, 600 pounds weight of cotton waste, 400 pounds weight of cotton
waste, and 1000 pounds weight of cotton of and belonging to the said
A. Warrens and another, his said masters, then and there being found,
seen and there feloniously did steal, take and carry away, against the
form of the statute, &c.

Second count.—And the jurors aforesaid upon their oath aforesaid,
do further present, that the said J. Heywood and J. Wood, J. Broughton,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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G. Robinson, and E. Kippax, on the day and year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton weft, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, afterwards, to wit, on the same day and year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton weft, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken and carried away, feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood on the 2nd November in the year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, was servant to the said A. Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year last aforesaid, 600 pounds weight of cotton weft, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton weft, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, afterwards, to wit, on the same day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton weft, 400 pounds of cotton twist, and 1000 pounds weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken and carried away, feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, then and there well knowing the said property last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, on the 24th December in the year aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, was servant to the said A. Warrens and another, and that the said J. Heywood afterwards, and whilst he was such servant to the said A. Warrens and another, to wit, on the day and year last aforesaid, 600 pounds weight of cotton weft, 400 pounds weight of cotton twist,

and 1000 pounds weight of cotton, of and belonging to the said A. Warrens and another, his said masters, then and there feloniously did steal, take and carry away, against the form of the statute, &c.

Eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, on the day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton weft, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of the property of the said A. Warrens and another, then and there being found, feloniously did steal, take and carry away.

Ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, afterwards, to wit, on the same day and year last aforesaid, at the borough aforesaid, and within the jurisdiction aforesaid, 600 pounds weight of cotton weft, 400 pounds weight of cotton twist, and 1000 pounds weight of cotton, of the property of the said A. Warrens and another, before then feloniously stolen, taken and carried away, feloniously did receive and have, they, the said J. Heywood, J. Wood, J. Broughton, G. Robinson, and E. Kippax, then and there well knowing the said property last aforesaid, to have been feloniously stolen, taken and carried away, against the form of the statute, &c.

Before the prisoners pleaded, their counsel applied to the Court to quash the indictment, on the ground that there was no allegation, in the counts charging the second and third larcenies, that they were respectively committed within six months after the commission of the larceny charged in the first count; and after hearing the counsel on both sides, I refused the application.

The counsel for the prosecution then applied to me to amend the indictment by introducing the words, the omission of which had formed the ground of the former objection.

I did not think that it was such an amendment as the statute enabled me to make, but said that, if I was satisfied that I had the power to do so, I should direct such amendment to be made.

The questions for the opinion of the Court of Criminal Appeal are, first, whether I was empowered by the statute to make the amendment applied for, and if the Court should be of opinion that I had that power, then that amendment is to be taken as having been made.

But if the Court should be of opinion that I had no power to make that amendment, then the second question for the opinion of the Court is, whether the indictment, as it now stands, and on which the prisoners were tried, is sufficient to sustain the verdict so found by the jury, and whether, on that finding, judgment may now be given.

R. B. ARMSTRONG, Recorder of Bolton.

A. Wills for the prosecution.—The indictment is good. It is clear upon the authorities that several felonies may be joined in the same indictment, and that it is for the Judge to exercise his discretion in calling on the prosecutor to elect for which he will

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proceed or to quash some of the counts. And what has been done by the recent Act, 24 & 25 Vict. c. 96, s. 5, which enacts that three larcenies committed against the same person within six months may be included in the same indictment against the same prisoner, is to take away the discretion formerly exercised by the Judge in such a case. In 2 Hale P. C. 173, it is said, "If there be one offender and several capital offences committed by him, they may be all contained in one indictment, as burglary and larceny. Larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment." And Lord Ellenborough said, in *Rex v. Jones* (2 Camp. 132): "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge in his discretion to call upon the counsel for the prosecution to select one felony and confine themselves to that; but this practice has never been extended to misdemeanors." And Buller, J. said, in *Young v. The King* (3 T. R. 105): "In misdemeanors, *Rex v. Benfield* (2 Burr. 989), shows that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration, but even in such cases it is no objection upon writ of error. On the face of an indictment every count imports to be for a different offence, and is charged as at different times. And it does not appear on the record whether the offences are or are not distinct. But if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence or prejudice him in his challenge of the jury, for he might object to a jurymans' trying one of the offences, though he might have no reason to do so as to the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment which contains several counts." In *Rex v. Kershaw* (1 Lewin C. C. 218), the indictment contained two distinct felonies. [MELLORE, J.—The practice has always been, where several felonies were included in one indictment, to put the prosecutor to elect for which one he will proceed, to prevent the prisoner being embarrassed in his defence. But all reason for such election is now taken away by the recent statute, where three larcenies only are charged. POLLOCK, C.B.—Strictly speaking, the whole presentment of the grand jury, from the first to the last indictment, constitutes but one indictment against all the prisoners. The objection to trying a prisoner on several felonies at once is rather an objection in the breast of the Judge than a matter of criminal pleading. Formerly it was not the practice to allow counts for larceny and receiving in the same indictment, but that was altered by statute.] In *Starkie's Crim. Plead.* 39, it is said, "If several felonies be charged

against a prisoner in the same indictment, it is no objection either upon demurrer or in arrest of judgment." See also 2 East P. C. 779.

No counsel appeared for the prisoner.

POLLOCK, C.B.—We are all of opinion that the indictment is good. At any rate it is now too late to allow the objection.

BLACKBURN, J.—At the same time we do not wish to sanction such a departure from the usual mode of criminal pleading.

Conviction affirmed.

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v.
HEYWOOD
AND
OTHERS.
1864.

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for three
larcenies.*

COURT OF QUEEN'S BENCH.

June 1, 1864.

(Before COCKBURN, C.J., CROMPTON, BLACKBURN, and
SHEE, JJ.)

KNOWLDEN, DRON and OXFORD v. THE QUEEN. (a)

Pleading—Vexatious Indictments Act—Averment of performance of conditions of—Recognizance—Conspiracy.

In indictments for offences within the provisions of the Vexatious Indictments Act, it is not necessary that it should appear upon the record that the conditions imposed by that Act, or any of them, have been complied with.

A., B., and C., charged with a conspiracy to defraud members of a friendly society, were bound over before a magistrate to appear at the next session of the Central Criminal Court to plead to such indictment as might be preferred against them in respect of the said charge. At the next session of the Central Criminal Court, a true bill was found against them upon the said charge, but was postponed until the following session, and the recognizances were respited, but not formally enlarged. At the following sessions a second indictment was found, charging A., B., C., and D., a fourth person not charged before the magistrate, with the same conspiracy :

Held, that as A., B., and C. had been once bound over by a magistrate, and the subject-matter of both indictments was the same as that mentioned in the recognizance, the defendants might be tried and convicted thereon.

WRIT of error on the conviction of John Knowlden, John Dron and Thomas Oxford, on an indictment preferred and found by the Grand Jury at the October Sessions 1863 of the Central Criminal Court. A fourth person, Charles Alfred Coombs, charged in the said indictment, was acquitted on the trial. The

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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charge was a conspiracy to defraud divers members of a friendly society called the Perseverance Life Assurance and Sick Fund Friendly Society. The three prisoners were each sentenced to eighteen calendar months' imprisonment with hard labour.

Upon the face of the assignment of error the following facts appeared :—

On the 19th August, 1863, at the Southwark Police Court, Knowlden and two sureties were bound by recognisance, whereby, after a recital as follows : “ Whereas the said John Knowlden (with others) was this day charged before me the said magistrate for that they did unlawfully conspire, confederate and agree together to cheat and defraud, against the peace,” &c. ; the condition was— “ if he should so appear at the next ensuing session of the Central Criminal Court, and surrender and plead to such indictment as might be found against him by such grand jury for or in respect of the charge aforesaid, and take his trial upon the said charge, and not depart the said court without leave, then the said recognisance to be void.

Oxford and Dron were bound over in similar recognisances on the 22nd August, 1863.

On the 19th August 1863, before the same police magistrate, the prosecutors and witnesses entered into recognisances whereby, after reciting that the three plaintiffs in error were that day charged before the said magistrate with a conspiracy to cheat and defraud, against the peace, &c., they were bound over to appear at the next ensuing session of the Central Criminal Court, and there prefer or cause to be preferred a bill of indictment against the three plaintiffs in error for the offence aforesaid, and duly prosecute the said indictment and give evidence thereon.

At the September Session of the Central Criminal Court, which was the next ensuing session after the 22nd August, an indictment for conspiracy to defraud several members of the above friendly society was preferred and found against the three plaintiffs in error (Charles Alfred Coombs not being then charged) by the Grand Jury.

On the application of the counsel for the prosecution, the trial thereof was postponed until the ensuing October session, on the ground of the absence of a material witness, and the said recognisances entered into by the plaintiffs in error were accordingly *duly respited* (b) until the said October sessions.

On the 24th October the Solicitor-General gave his consent, as set out below, to a fresh indictment being preferred against the three plaintiffs in error and Charles Alfred Coombs. Accordingly, on the 26th October the indictment was found on which the plaintiffs in error were tried and convicted.

That indictment was in the ordinary form, and did not state on the face of it that it had been preferred by leave of a judge or the

(b) That was the mode in which the fact was stated on the record in error, and there was no explanation as to the meaning of *duly respited*, or statement of what was done at the time.

assent of the law officer of the Crown. The plaintiff in error, on being called upon to plead to the indictment, refused to do so, and the Court directed a plea of not guilty to be entered for them on their behalf.

The prisoners were not tried upon the first indictment found at the September session, which remains on the files of the Central Criminal Court undisposed of.

Assignment of error :

That at the time of the presenting and finding of the indictment, neither the prosecutor nor any other person prosecuting the indictment were or was bound by recognizances, to prosecute or give evidence, but that certain recognizances entered into by the prosecutors had been discharged and fulfilled, so far as they might be discharged and fulfilled, by the presenting and finding of an indictment at the September Sessions, 1863, of the Central Criminal Court, when the three plaintiffs were charged with a conspiracy jointly one with another, and not with the said Coombs, which said indictment has never been quashed, and is now pending ; and the plaintiffs further say that they were not committed, or detained in custody, or bound over by recognizances to appear to answer the indictment found at the October sessions, nor was the last-mentioned indictment preferred or found with the consent or by the direction of a judge of a Superior Court, or by the direction of the Attorney or Solicitor-General, nor were the provisions of the statute 22 & 23 Vict. c. 17, in any way complied with.

And the plaintiffs further assigned that, contrary to the said statute, they were not, nor were any of them, bound by recognisance to appear to answer to the indictment preferred in October, but that they were bound by recognisance before a police magistrate to appear to the September indictment, in which Coombs was not charged, which offence was another and different offence to that which the plaintiffs were bound over to appear to answer.

And the plaintiffs further assigned that, on the 24th October 1863, Her Majesty's Solicitor-General signed a written direction to the effect following, to wit :

Central Criminal Court, October Session 1863.

REG. v. JOHN KNOWLDEN, THOMAS OXFORD, JOHN DROW, AND
CHARLES ALFRED COOMBS.

I direct an indictment to be preferred against the aboved-named Charles Alfred Coombs, at the Central Criminal Court, for a conspiracy to defraud.

(Signed)

R. P. COLLIER, Solicitor-General.

Dated, 24th Oct. 1863.

And that thereupon the indictment on which the plaintiffs were found guilty was presented and found, and that there is no sufficient allowance and authorisation of the said indictment by consent in writing.

The plaintiffs further assigned error in this, that it did not appear upon the record and proceedings that the said indictment was authorised and allowed, as provided by the said statute, by the

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consent in writing of a judge of the Superior Courts at Westminster, or of Her Majesty's Attorney-General or Solicitor-General, so as to be lawfully presented and found by the said jury.

Joinder in error.

Hardinge S. Giffard (*Bealey* and *Kydd* with him) for the plaintiffs in error.—The conviction cannot be sustained. The 22 & 23 Vict. c. 17 (a) renders it necessary that certain conditions precedent should be complied with before an indictment for conspiracy is presented to or found by a grand jury. Those conditions ought to be entered on the record, and it must appear that they have been fulfilled. In this case it should have appeared that the plaintiffs in error were bound over by recognizance to answer the indictment on which they were convicted, or that the indictment was preferred by the direction or leave of a judge or law officer of the Crown. [BLACKBURN, J.—How is it with respect to criminal informations? The 4 & 5 Will. & M. c. 18, was passed to prevent malicious informations in the Court of Queen's Bench, and sect. 2 says, that the clerk of the Crown shall not, without express order of the Court, given in open Court, exhibit, receive, or file any information, yet the record never shows on the face of it that such order has been made. The rule in criminal pleadings is, that where there is general jurisdiction and a qualification is subsequently put on it, it is not necessary to notice the qualification on the record.] Under that Act the Court of Queen's Bench, whose information it is, gives the leave. In a *qui tam* action to recover a penalty for acting as a commissioner under the Public Health Act (11 & 12 Vict. c. 63, s. 133), it was held necessary to aver in the declaration the consent of the Attorney-General to the proceedings: (*Hollis v. Marshall*, 27 L. J. 235, Ex.) [BLACKBURN, J.—There the statute which imposed the penalty also imposed the conditions upon which proceedings for the recovery of it might be taken.] The 22 & 23 Vict. c. 17, says that the grand jury shall not find any indictment in the specified misdemeanors, unless the conditions have been complied with. In pleading, where place or any particulars as to the character or person are essential, they must be averred. So in bankruptcy it was essential to set out all the ingredients which went to make out the bankruptcy. Each element of the offence must be stated on the record: (*Reg. v. Fearnley*, 1 Leach, 426; *Macdonald's case*, Foster's C. L. 59.) The 22 & 23 Vict. c. 17, takes away the whole jurisdiction of the grand jury, unless the conditions have been complied with. [CROMPTON, J.—Your argument must go

(a) The 22 & 23 Vict. c. 17, s. 1, enacts that no bill of indictment for perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, &c., shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment has been preferred by the direction of, or with the consent in writing of a judge of one of the Superior Courts, or of the Attorney or Solicitor General.

to the length that in every indictment for obtaining money or other property by false pretences you must aver a committal by a magistrate, or leave of a judge or law officer of the Crown.] If the record does not show that, it is doubtful whether the liberty of the subject has been legally taken away or not. This defect may be taken advantage of on writ of error. In *Reg. v. Heane* (9 L. T. 719) for a similar objection the Court said that they would not quash the indictment, but leave the defendant to his remedy by a writ of error. In *Reg. v. Forsyth* (2 Leach, 286) an indictment for bigamy, committed out of the county, not averring the prisoner to have been apprehended within the county, according to the 1 Jac. c. 11, was held bad. In *Reg. v. Carter* (1 Stra.) a conviction by justices was held bad for not showing that they had power to hear and determine within the county. And in *Whitehead v. The Queen* (7 Q.B. 582) the record of an indictment was held bad on writ of error, which did not state that the grand jury by whom it was found were good and lawful men of the county. Secondly, as to the error in fact. The indictment preferred and found at the October sessions against four persons was another and different one to that found at the September sessions. [COCKBURN, C.J.—The recognizances bind them to answer the charge, not any particular indictment.] If so, the three were not bound over to answer the charge along with Coombs. The authority given by the Act was exhausted by the preferring and finding of the first indictment at the September sessions. [BLACKBURN, J.—What are we to understand by the statement of the recognizances being *duly respited* to the next sessions? That appears to me to be the material point.] The recognizances apply to different persons. They cannot be construed to mean that the prosecutor may prefer a charge of conspiracy against four persons.

The *Solicitor-General* for the Crown.—The recognizances were properly respited: (*Lord Drummond's* case.) The words of the recognizance are to prosecute or give evidence against the person accused of such offence. Respiting means, that the time for estreating the recognizances shall be enlarged. [COCKBURN, C.J., referred to Burn's "Justice" Bail, 330; 1 Chit. Crim. Law, 105.] It is immaterial as regards the recognizances whether the charge is against three or four persons. It is not necessary that all the persons charged with the conspiracy shall be convicted. The indictment on which the plaintiffs in error were found guilty meets the charge mentioned in the recognizances. Then, as to the averment on the record of the conditions of the statute having been complied with, this is similar to the case of criminal informations, in which it is not necessary to aver that leave of the Court has been obtained pursuant to the 4 & 5 Will. & M. c. 18, s. 2. The rule is laid down in Paley on Conv. 195 (edit. 4). Again, this is not matter for a writ of error; the application should be to quash the indictment, or for a *certiorari*, on the ground that the conditions of the statute have not been complied with: (*Reg. v. Mansell*, 8 E. & B. 54.)

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Giffard in reply.—In *Reg. v. Heane* (9 L. T. Rep. N.S. 719: 33 L. J. 154, M. C.) the Court said that they would not quash the indictment, but leave the party to his writ of error.

COCKBURN, C.J.—I am of opinion that our judgment should be for the Crown. As regards the first question, whether the condition required by the 22 & 23 Vict., as a condition preliminary to the presenting to and finding of the indictment by the grand jury must appear on the face of the record, it appears to me that it is not necessary. It is true that, in general, whatever is necessary to give jurisdiction must appear on the face on the record, but that rule is subject to the qualification pointed out by my brother Blackburn during the argument. Here it is not a condition attached to the jurisdiction of the grand jury over the offence. The moment the condition is complied with, the grand jury are seised of the matter, and the offence need only be stated on the indictment, in the usual form. Nothing could be more inconvenient than that matters of this description should be stated on the record, for it would follow that they might be put in issue, and then it would be necessary in every case within the Act to try the question before the petty jury, whether the accused had been committed or bound over to answer the subject of the indictment. That could not have been the intention of the Legislature. No doubt there ought to be in some way enough evidence to satisfy the grand jury that the condition of the statute has been complied with, but when that is done, the grand jury exercise the same jurisdiction as they exercised before the Act. Where the parties and the prosecutor have been bound over to prefer the indictment, the accused must be aware of the fact, or if he has any doubt, the fact may, on inquiry, be readily ascertained. Supposing a prosecution to have been improperly instituted, and a deception practised on the officers of the court as to the preliminary conditions having been complied with, there can be no doubt that redress can be had in some way; whether by application to the judge before the trial to quash the indictment, or whether when it comes to the party's knowledge at a later period by some other proceeding, it is not necessary now to decide. It is enough to say that redress can be obtained in some way. I think, therefore, that, with reference to the first question, the argument of the defendant fails. As to the other point of error in fact, it was urged in the first place that the prosecution upon which the plaintiffs in error were convicted was not the same prosecution as that to which the recognisances entered into relate, because the prosecutor was bound over to prosecute on a charge of conspiracy against three persons, whereas the indictment, on which the prisoners were tried and convicted, was a charge of conspiracy against four persons. In substance both indictments were for the same offence, and the subject-matter of the conspiracy was the same, and the only variation was that there was an additional conspirator charged. But inasmuch as two or more out of a large number of persons charged with a conspiracy may be convicted, the fact that an addi-

nal person was added in the indictment on which the prisoners were found guilty makes no difference. Then it was further said that the recognisances of the accused to appear and answer the charge were no longer in existence. In the first place it is questionable whether the recognizances were not still in existence, for although fresh ones were not entered into at the September sessions, yet the accused had never appeared according to the exigency of the recognisances, which for the benefit of all parties, instead of being estreated at the September sessions, were enlarged or respited until the next sessions. I doubt whether that is not keeping the recognisances alive for the purpose of the second indictment. Whether that is so or not, I think that, the accused having been bound over to appear and take their trial on a charge of conspiracy, the condition of the statute was complied with so long as the indictment was preferred for the same offence as they were bound over to meet. The words of the statute are large enough to meet that construction of it, and the purpose and object of the Act being to protect persons against vexatious indictments, as soon as the parties have gone before a magistrate who has bound them over, that object has been gained. If that has been done by the magistrate, or an order of a judge has been obtained to present the indictment to the grand jury, the statute has been satisfied. I therefore think our judgment should be for the Crown.

CROMPTON, J.—I am of the same opinion. I do not think it necessary to hold that it is indispensable in all cases with in the Act that there should be on the record an averment that the indictment has been preferred by the assent of a judge or the law officers of the Crown. There is a general jurisdiction in the grand jury to find a bill of indictment; and this enactment is a direction in effect to the grand jury not to act in the particular cases specified until the things required by the Act have been done. This Act is to prevent vexatious indictments for certain misdemeanors. It is different to an Act which creates a penalty not to be incurred except under certain circumstances, in which case it must be shown on the record that those circumstances have happened. The cases referred to upon the statute of 4 & 5 Will. & M. are very much in point. After the Revolution of 1688 the proceeding by way of a criminal information was very much abused, and that statute was passed to prevent the vexatious abuse of that process, and it enacted that the coroner and attorney of the Crown should not file any criminal information in certain cases without the express direction of the Court given in open court. The Crown officer is placed very much in the same position as the grand jury, but it has never been deemed necessary to state on the face of a criminal information that the statute has been complied with. In the present case the accused has the means of inquiry, and practically there is no real difficulty in the case. The officer of the Court has every commitment sent to him, and he knows whether there has been a committal or not in each case. Through his office the indictment must pass on its way to the grand jury, and

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it is very much like a direction to him to take care that an indictment shall not be presented to the grand jury until the condition of the statute is complied with. The practice in modern times under the statute 4 & 5 Will. & M. in the case of criminal informations is not to aver compliance with the conditions of that statute, on the record, and I cannot think that in this case the matter ought to appear on the record. It is not necessary to consider what the exact remedy may be when the statute has not been complied with. As I have said before, I think the best course is to apply to quash the indictment or any part of it which is bad for this cause. But it is said that a writ of error will lie. Supposing that to be so, yet I am of opinion that there is no ground of error assigned in this case. The parties were both before the magistrate, and the accused knows whether the magistrate committed him or not for trial for this offence. It is also clear that the prosecutor was bound to give evidence against the party accused of this offence. The offence of which the prisoners have been found guilty is the same offence. Then as regards the indictment being found at the subsequent sessions, it is the same offence, though the case stood over until the next sessions for which the prisoners were bound over. If the recognisances had been discharged at the September sessions, it would have been different. It is no answer to say that the accused did not appear at the September sessions. The only difficulty that struck me was, whether the two indictments were the same prosecution, and I think that they were practically the same. Therefore, both grounds fail.

BLACKBURN, J.—I am of the same opinion. The Vexatious Indictments Act puts as a condition, that before any bill of indictment for any of the offences specified shall be presented to or found by the grand jury, certain things shall be done. It does not alter the nature of the offences or the general jurisdiction of the grand jury. If the things required, constituted any part of the offence, then they would be a matter of trial before the petty jury; but that is not so—they are only a condition put on the general jurisdiction of the grand jury to find a bill of indictment in the cases specified. It is precisely the same as the case of vexatious criminal informations. It has never been the practice to aver in a criminal information that leave has been obtained to prefer it, but the mode of pleading remains the same as at common law before the 4 & 5 Will. & M. passed. I therefore think the first objection made a bad one. If a bill of indictment were improperly preferred, and found, it may be that the more convenient course, when the fact was discovered, would be to apply to the court before the trial to quash it, and I think the court would have jurisdiction to quash it or any part of the indictment, as to which the statute was not complied with. Or it may be when the question is whether the case falls within the statute or not, as in *Reg. v. Heane* (where it was doubted whether the case was one of perjury or not), in which case it might be, that one court

might entertain the view that it was not within the Vexatious Indictments Act, and another might hold that it was, then in such case, perhaps, the defendant might plead to the jurisdiction. I am also inclined to think that error in fact would lie, but I do not desire to express an opinion on that without further consideration. It is not necessary to decide what is the proper course to pursue, for here the condition of the statute has been complied with. As to the recognisances: the prisoners were bound to appear at the next sessions to an indictment for this conspiracy to defraud this benefit society. The condition and the spirit of the Act have been fulfilled, which was to prevent vexatious indictments being preferred, and that object was fulfilled as soon as the accused were bound over by the magistrate to answer the charge. It may be that a fresh charge would not be right, but the fact of four persons being included in the indictment, whereas three persons only were implicated before the magistrate, does not vary the offence. I am of opinion, therefore, that judgment must be for the Crown.

SHEE, J.—I am of the same opinion. The Legislature must be taken to know the mode in which indictments are usually preferred, and that they pass through the hands of the officers of the court to the grand jury. I think that the statute is nothing more than a direction to those officers to take care that no bill shall be presented to the grand jury unless the requisitions of the statute have been complied with. I think the Legislature might have had in view the 4 & 5 Will & M., for the Act of 22 & 23 Vict. contemplates the same evils. I think that if it came to the knowledge of the court that a bill of indictment had been found without the requisites having been complied with, it might be treated as a nullity and as if it had not been found, and that the court might quash it. As to the recognisance, the question in my opinion is, not whether the indictment is the same, but whether the offence is the same. Here the offence is the same and the facts are the same, and the only difference is that a fourth person is charged in the second indictment. And I think that the accused should have been bound by recognisances within the meaning of the statute to appear to answer this indictment. It was said that the words of the statute, "has been bound by recognisance," must mean that unless the person is at the time of trial under recognisance, he shall not be called upon to answer the charge. I think that is not so, and that is quite enough to satisfy those words, if this requisition has been at some time complied with. I therefore concur in the judgment of the Court.

Judgment for the Crown.

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COURT OF CRIMINAL APPEAL.

June 4, 1864.

(Before COCKBURN, C.J., WILLIAMS, J., MARTIN, B.,
CROMPTON, J., and BRAMWELL, B.)

REG. v. BULMER. (a)

False pretences—Larceny—Evidence—24 & 25 Vict. c. 96, s. 88.

An indictment for false pretences alleged that the prisoner pretended he was the servant of Mr. Hardman, and was sent to buy a horse for him, whereby the prisoner unlawfully obtained a horse from the prosecutor. The evidence was, that the prisoner represented himself as the servant of Mr. Hardman, but the prosecutor's son, confounding the name with that of Harding, a person whom he knew, said in the prisoner's presence to his father, "I am going to sell the horse to Mr. Harding," whereupon the prisoner adapted his story to meet that belief of the prosecutor and his son, and so obtained the horse.

Held, that a conviction could not be sustained, as the pretence by which the horse was obtained was, that the prisoner was the servant of Mr. Harding, and that was not averred in the indictment.

To prevent a prisoner indicted for false pretences from being acquitted on the ground that the offence is that of felony (24 & 25 Vict. c. 96, s. 88) the false pretences laid must be proved, for under the statute he is to be found guilty of the misdemeanor.

CASE reserved for the opinion of this Court by the Recorder of Newcastle-on-Tyne.

The prisoner was tried before me at the last General Quarter Sessions for the town and county of Newcastle-upon-Tyne, on a charge of obtaining a horse by false pretences.

The indictment ran as follows :

Newcastle-upon-Tyne } The jurors for our Lady the Queen upon their
to wit. } oath present that George Bulmer on the 30th
March, 1864, unlawfully, knowingly and designedly, did falsely pretend to one James Henderson the younger, that the said George Bulmer was the servant of one William Hardman, of Stickleby, in the county of Northumberland (the said William Hardman then and long before being

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

well known to the said James Henderson the younger), and that the said George Bulmer was then sent by the said William Hardman to buy a horse for the said William Hardman, by means of which said false pretences the said George Bulmer did then unlawfully obtain from the said James Henderson the younger, a certain horse, with intent thereby then to defraud, whereas in truth and in fact the said George Bulmer was not then the servant of the said William Hardman; and whereas in truth and in fact the said George Bulmer was not then or at any other time sent by the said William Hardman to buy a horse for the said William Hardman, to the great damage and deception of the said James Henderson the younger, to the evil example of all others in the like case offending, against the form of the statute, &c.

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—
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—
False pretences
—*Proof.*

The following are the principal facts that were proved in evidence:—

James Henderson, of Denton Burn, had a mare for sale at the horse fair in Newcastle, on Wednesday, March 30. The prisoner went up to him and asked if the mare was for sale. "Yea." "What price?" "12*l.*" "Where do you come from?" "Denton Burn." "The same place," said the prisoner, "that my governor is from." "Who is he?" "Mr. Hardman; he lives at Stickley Farm." "What does your master want her for?" "To drive in a waggonette and ride occasionally."

Henderson knew no person of the name of Hardman, of Stickley Farm, but he had known very well a gentleman named Harding, who had lived some time previously at Benwell Lodge, about ten miles from Stickley.

Henderson and the prisoner then went into the Sun Inn, where Henderson's father joined them. Henderson said to his father, "I am going to sell a horse to Mr. Harding of Benwell Lodge," upon which his father remarked to the prisoner, "He does not live there now." "No," said the prisoner; "he lives now at Stickley Farm." "How long is it since he went there?" The prisoner turned about, gave a bow of his head and made no answer.

After some bargaining, during which the prisoner expressed his great wish that his master should see the mare, Henderson agreed to take 1*l.* for the loss of the fair, and it was arranged that the prisoner should take the mare home to his master, and meet Henderson next day at the Sun Inn to pay the agreed price, *videlicet*, 12*l.* The prisoner, according to Henderson, then said, "You must give me a note of the price for my master to see." To this Henderson agreed, and he wrote out and signed the following memorandum, which the prisoner dictated:

George Bulmer bought of James Henderson a brown horse for the sum of 12*l.*, to be paid at the Sun Inn at eleven o'clock on March 31.

Denton Burn.

JAMES HENDERSON, Butcher.

The prisoner then paid Henderson 1*l.*, and the mare was handed over to him.

Henderson was pressed upon cross-examination as to whether this 1*l.* was not paid on account of the purchase-money; but he

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positively swore that the 1*l.* was paid as the consideration for his giving up the chance of a better price at the fair. In answer to further questions he said, that if the prisoner had met him at the Sun Inn and paid the money next day, it would have been all right; but he added that he would never have parted with the mare at all, or accepted the 1*l.*, or signed the memorandum or agreed to meet at the inn, but in the belief that the prisoner was the servant of Mr. Harding, late of Benwell Lodge, and was purchasing the mare for his master.

Mr. Hardman, of Stickley Farm, was called and proved that the prisoner was not his servant, or in any way authorised by him to buy the mare, and that the prisoner lived a mile and a half from his farm.

It was proved that there was no other Hardman or Harding at Stickley, and that Mr. Hardman, of Benwell Lodge, did not reside at or near Stickley Farm.

A few hours later on the same evening, March 30, the prisoner sold the mare in the fair for 6*l.*, having first asked 9*l.* for her. She was resold for 8*l.* 12*s.* 6*d.* the same night, and next day was offered to Henderson himself by a third owner for 16*l.*

The prisoner never appeared at the Sun Inn, and on Friday, April 1, was taken into custody.

On the warrant being read, which charged him with obtaining a horse by false pretences from J. Henderson, he said, "Is that all?" and afterwards added that he bought the horse, producing the document above mentioned as a voucher for his statement.

At the close of the case for the prosecution, Mr. Blackwell, the counsel for the prisoner, submitted to me :

First, that, looking to the memorandum signed by the prosecutor, to the payment of the 1*l.*, and to the admission of the prosecutor that it would have been all right if the prisoner had met him at the inn and paid the money, the evidence showed that the prosecutor had sold the mare to the prisoner, and having taken the risk of parting with her on the understanding that the price should be paid next day, there was no case to go to the jury. He referred to *Reg. v. Dale*, 7 C. & P. 352.

Secondly, that the evidence did not support the false pretences laid in the indictment, inasmuch as the prosecutor admitted he parted with the mare in the belief that the prisoner was the servant of Mr. Harding, of Benwell Lodge, whereas the pretence proved was that he was the servant of Mr. Hardman, of Stickley Farm, and the inuendo as to the said W. Hardman being very well known to the prosecutor was, in fact, disproved.

I overruled both objections, holding, as to the first, that it was a question for the jury whether the prosecutor would have parted with the mare at all, or agreed to have met at the Sun Inn, if he had not believed that the prisoner was a servant acting for his master in the transaction; and, as to the second objection, holding that, if the jury thought the pretence as to W. Hardman, of Stickley, being the prisoner's master was false, and that it led the

prosecutor to part with his mare even under a misapprehension as to the identity of the master referred to, they might convict the prisoner under the present indictment.

I then called the attention of the prisoner's counsel to the Criminal Law Consolidation Act (24 & 25 Vict. c. 96, s. 88), "Provided that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor."

Upon this it was submitted that there was not sufficient evidence, had this been an indictment for larceny, to justify a conviction for felony; and, secondly, that though the Act provided that the prisoner "should not be acquitted," the jury would not be justified in returning a general verdict of guilty under this indictment, if they thought the false pretences were not proved as laid.

I held that they might, and that the Act was intended to apply to such a case as the present, and that it was for the jury to say whether the prisoner acted *bonâ fide*, or whether he had from the first fraudulently designed to deprive the owner of his mare and appropriate her to his own use, for that if the whole proceeding on his part was a trick and contrivance to deprive the owner of his property and possession of the mare, that would be enough to support a conviction for larceny: (*Reg v. Shepherd*, 9 C. & P. 121.) The learned counsel then addressed the jury on behalf of the prisoner.

In summing up I directed the jury according to the above ruling. The jury after some deliberation found a verdict of guilty, and in answer to a question from me they said they found the prisoner guilty of obtaining the mare by the false pretences laid, and further that, taking my ruling as to the law, they thought the facts amounted to a larceny by the prisoner.

Bail not having been tendered, I sentenced the prisoner to six month's imprisonment with hard labour, which he is now undergoing.

Being requested in the course of the argument to reserve a case for the Court of Criminal Appeal, I consented to do so; and the question for the Court I respectfully submit is, whether the prisoner has been properly convicted?

W. DIGBY SEYMOUR, Recorder.

No counsel was instructed for the prisoner.

Gainsford Bruce for the prosecution.—First, on the facts in this case and the finding of the jury, that this was a larceny, the conviction may be sustained under the 24 & 25 Vict. c. 96, s. 88.

CROMPTON, J.—The enactment does not say that if any larceny is proved he is not to be acquitted of the misdemeanor; but that if you prove the misdemeanor as it is laid in the indictment, the prisoner is not to be acquitted because the case amounts to a larceny.

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Bruce.—Secondly, as to the false pretences, it is submitted that, although the prisoner subsequently altered his story to meet the prosecutor's misconception that he was dealing with Mr. Harding's servant, nevertheless he also made the false representation that he was Mr. Hardman's servant, and the jury must be taken to have found that that led the prosecutor to part with the horse; and if so, the conviction may be supported.

COCKBURN, C.J.—There were plenty of false pretences, if rightly charged in the indictment. The false pretence which operated on the prosecutor's mind, and led him to part with his property, must be properly laid and proved. It is plain that the prosecutor confounded the name of Harding with that of Hardman, used by the prisoner, who, seeing that, adapted his story to meet that, and it was the representation that he was Mr. Harding's servant which led the prosecutor to part with his horse. But, unfortunately, the indictment makes the pretence that he was Mr. Hardman's servant the inducing cause of the prosecutor's parting with the horse.

BRAMWELL, B.—On this indictment, if the averments were true, the seller would have a right to look to Mr. Hardman as liable for the price, whereas he intended to sell the horse to Mr. Harding, and to hold him liable.

Bruce.—Supposing the indictment not proved, the prisoner may be convicted of larceny.

MARTIN, B.—No. My brother Crompton has given the true reading of the section.

CROMPTON, J.—The prisoner is to be convicted of the misdemeanor, not of larceny.

WILLIAMS, J.—I feel great difficulty in concurring with the judgment of the Court.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

June 4, 1864.

(Before COCKBURN, C.J., WILLIAMS, J., MARTIN, B.,
CROMPTON, J., and BRAMWELL, B.)

REG. v. COLLINS and OTHERS (a).

Attempt to commit larceny.

In order to convict of an attempt to commit larceny, it must appear that there was property in the place where the attempt is made, that could be stolen.

Therefore, where a person put his hand into the pocket of another, with intent to steal, he cannot be convicted of an attempt to steal, unless it appear that there was property in the pocket, which might be stolen.

It should be left to the jury to say whether there was any property in the pocket.

CASE reserved for the opinion of this Court by the Deputy-Assistant Judge at the Middlesex Sessions.

The prisoners were tried before me at the Middlesex Sessions on an indictment which stated that they unlawfully did attempt to commit a certain felony; that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman, whose name is to the jurors unknown, with intent the property of the said woman, in the said gown pocket then being, from the person of the said woman to steal, &c.

The evidence showed clearly that one of the prisoners put his hand into the gown pocket of a lady, and that the others were all concerned in the transaction.

The witness who proved the case said on cross-examination that he asked the lady if she had lost anything, and she said "No."

For the defence it was contended that to put a hand into an empty pocket was not an attempt to commit felony, and that as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was not, and as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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I declined to stop the case upon this objection ; but as such cases are of frequent occurrence, I thought it right that the point should be determined by the authority of the Court of Criminal Appeal. The jury found all the prisoners guilty, and the question upon which the opinion of your Lordships is respectfully requested is, whether under the circumstances the verdict is sustainable in point of law ?

The prisoners are in custody awaiting sentence.

JOSEPH PAYNE, Deputy-Assistant Judge.

Poland for the prisoners.—The conviction is bad. It is not an indictable offence to put a hand into an empty pocket with intent to steal, but an offence punishable only under the Vagrant Act. It is not alleged in the indictment that there was any property in the pocket. This is very like the case of *Reg. v. M'Pherson* (1 Dears. & B. 197; 7 Cox Crim. Cas. 281), where it was held that a man who was charged with breaking and entering a dwelling-house and stealing certain specified goods, could not be convicted unless the specified goods were in the house, notwithstanding other goods were there. [COCKBURN, C.J.—That case proceeds on the ground that you must prove the property as laid.] In the course of the argument Bramwell, B., put this very case, and said: “The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first plausible; but supposing a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?” So in *R. v. Scudder* (3 C. & P. 605) it was held that there could not be a conviction for administering a drug to a woman to procure abortion, if it appeared that the woman was not with child at all. That case was before the Consolidation Act (24 & 25 Vict. c. 96). [BRAMWELL, B.—You may put this case: Suppose a man takes away an umbrella from a stand with intent to steal it, believing it not to be his own, but it turns out to be his own, could he be convicted of attempting to steal?] It is submitted that he could not.

Metcalf for the prosecution.—The fallacy in the argument on the other side consists in assuming that it is necessary to prove anything more than an attempt to steal. The intent to steal, it is conceded, is not sufficient, but any act done to carry out the intent, as putting a hand into the pocket, will do. [CROMPTON, J.—Suppose a man were to go down a lane armed with a pistol, with the intention to rob a particular person, whom he expected would pass that way, and the person does not happen to come, would that be an attempt to rob the person?]

COCKBURN, C.J.—We are all of opinion that this conviction cannot be sustained, and in so holding it is necessary to observe that the judgment proceeds on the assumption that the question, whether there was anything in the pocket of the prosecutrix which might have been the subject of larceny, does not appear to have

been left to the jury. The case was reserved for the opinion of this Court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is an attempt to commit larceny? We are far from saying that, if the question, whether there was anything in the pocket of the prosecutrix had been left to the jury, there was not evidence on which they might have found that there was, and in which case the conviction would have been affirmed. But, assuming that there was nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. This case is governed by that of *Reg. v. McPherson*, and we think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged. In this case, if there was nothing in the pocket of the prosecutrix, in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, and finding nothing in the room, in that case no larceny could be committed, and therefore no attempt to commit larceny could be committed. In the absence, therefore, of any finding by the jury in this case, either directly, or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

June 4, 1864.

(Before COCKBURN, C.J., WILLIAMS, J., MARTIN, B.,
CROMPTON, J., and BRAMWELL, B.)

REG. v. JOHN GLOVER. (a)

Embezzlement—Relation of master and servant—County Court bailiff.

A County Court bailiff was indicted for embezzling moneys of the prosecutor, the high bailiff. The moneys embezzled were received on levies under County Court processes :

Held, that the charge could not be sustained, as the relation of master and servant did not exist between the bailiff and high bailiff, nor was the bailiff bound to pay over the fees to him.

CASE reserved for the opinion of this Court at the Oxfordshire General Quarter Sessions.

The indictment contained three counts :

The first count charged that, on the 3rd September 1863, the prisoner being then employed as servant to the prosecutor, did, by virtue of such his employment, then and whilst he was so employed, receive and take into his possession certain money, to the amount of 12s. 3d., for and in the name and on account of the prosecutor, his master, and did then fraudulently embezzle the said money; and that the prisoner did feloniously steal, take, and carry away the said money, the property of the prosecutor, from his master as aforesaid, against the form of the statute, &c.

The second count charged that the prisoner afterwards, and within six calendar months, &c., to wit, on the 1st October 1863, being the servant to the prosecutor, embezzled 1l. 1s. 2d. (as in the first count.)

And the third count charged a similar embezzlement of 3l. 6s. 9d. on the 11th October 1863.

The prisoner pleaded to the indictment generally, not guilty. On the trial the jury found him guilty; but the Justices before whom the case was tried, reserved for the consideration of the Court of Criminal Appeal the following question of law, which arose on the trial; and judgment was postponed, and the prisoner

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

discharged on recognisance of bail to appear and receive judgment.

Question: Whether the prisoner was the servant of the prosecutor within the provisions of the statute 24 & 25 Vict. c. 96, ss. 68 and 71?

The evidence was as follows:—That the prosecutor being high bailiff of the Witney County Court, appointed the prisoner (by the allowance of the Judge of the Court, and under the provisions of the statute 9 & 10 Vict. c. 95, s. 31), to be one of the bailiffs to assist the high bailiff;—

That the prisoner in his official capacity received the three sums mentioned in the indictment, being the amounts of three levies received by virtue of processes issued out of the court, and that he neglected to pay over the amounts to the Registrar of the Court, but embezzled them, and that consequently the prosecutor was held responsible to the County Court.

By virtue of the above Act (s. 31), the high bailiff may at his pleasure dismiss a bailiff; and the prosecutor had in this case (subsequently to the appropriation of the three sums of money) dismissed the prisoner; and every bailiff so appointed may also be suspended or dismissed by the judge. By sect. 33, the high bailiff is entitled to receive all fees and sums of money allowed by the Act in the name of fees payable to the bailiff, out of which the high bailiff is to provide for the execution of the duties for which such fees are allowed, and for the payment of the assistant bailiffs according to a scale, and the high bailiff is to be responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the act and defaults of himself and his officers.

Rule 31 of the Statutory Rules of Practice of County Courts is as follows:

Every bailiff levying or receiving any money by virtue of any process issuing out of the Court of which he is bailiff shall, within twenty-four hours from the receipt thereof, pay over the same to the Registrar of such Court, and shall file such process and retain the same in his custody.

Although the prosecutor was answerable for the acts of the prisoner, and for all moneys not paid into Court by him, yet, as the sums in question ought, under the above rule, to have been paid to the Registrar of the Court, the question arose whether the prisoner was in law the servant of the prosecutor, as laid in the indictment.

The statute 9 & 10 Vict. c. 95, s. 116, provides—

That if any bailiff of the Court shall be charged with not duly paying or accounting for any money levied by him, under the authority of this Act, it shall be lawful for the Judge to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties, in the like manner as attendance of witnesses in any case may be enforced, and to make such order thereupon for the re-

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payment of any money so levied as aforesaid, and for the payment of such damages and costs, as he shall think just, and also, if he shall think fit, to impose such fine upon the bailiff, not exceeding 10*l*. for each offence, as he shall deem adequate, and in default of payment of any money so ordered to be paid, payment of the same may be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said Court.

HUGH HAMERSLEY, Chairman.

No counsel appeared for the prisoner.

Sleight for the prosecution.—The conviction is good. The relation of master and servant existed in this case. The high bailiff appoints the bailiff, and has power to dismiss him: (9 & 10 Vict. c. 95, s. 31.) The power given to the judge of the County Court by sect. 116 of the 9 & 10 Vict. c. 95, to inquire into the bailiff's conduct and fine him, has reference to defaults arising out of mere negligence and carelessness, and not to a case of felony. A servant is a person who is employed by another, and bound to obey the orders of another. [COCKBURN, C.J.—The bailiff is bound to obey the orders of the Court. CROMPTON, J.—If the high bailiff were to tell the bailiff not to pay over moneys levied by him to the Court, and he were to obey, the bailiff might be punished by the Court for not paying them over.] It is submitted that the bailiff is the servant of the high bailiff, although he is also required by the County Court Rules to pay over moneys levied or received under process, to the Registrar.

COCKBURN, C.J.—Even if it were made out, which I think it is not, that the bailiff is the servant of the high bailiff, he was not bound to pay over these moneys to his master. But as he was not the servant of the high bailiff, and this was not the money of the high bailiff, the conviction must be quashed. He was anything but the servant of the high bailiff, and by the statutory rule of practice he was bound to pay the moneys to the Registrar.

CROMPTON, J.—Even in the case of a bound bailiff to the sheriff, the bailiff is not answerable criminally. I never heard of a prosecution against a bailiff in a case like this. The County Court bailiff is the officer of the Court, and he was not bound to pay these moneys to the high bailiff.

The rest of the Court concurring,

Conviction quashed.

WESTERN CIRCUIT.

SPRING ASSIZES, 1864.

Exeter, March 10.

(Before Mr. Baron BRAMWELL.)

REG. v. HARRISON. (a)

Perjury—Evidence.

On the trial of an indictment for perjury, alleged to have been committed on the trial of an indictment for an assault, all the evidence that was admissible on the trial of the indictment for the assault is admissible on the trial of the indictment for perjury.

THE prisoner was indicted for perjury alleged to have been committed at the last Quarter Sessions for Devonshire, on the trial of Mr. A. Poole, the present prosecutor, on a charge of indecent assault.

At the trial of *Reg. v. Poole*, the now defendant swore that Mr. Poole, who was a schoolmaster, and from whom she was taking lessons, had indecently assaulted her at a certain place and time. Upon her cross-examination she stated that the alleged liberties had been taken with her consent, or at least, without objection or resistance; and upon this the Court directed an acquittal, the merits of the case as they affected the defendant, who denied the fact of the assault, not having been tried.

Mr. Poole, the then defendant, now indicted the then prosecutrix for perjury.

The prosecutor and several witnesses were called to prove that no such assault could have been committed at the time alleged as that at which the assault was committed.

Coleridge, Q.C., for the defendant, proposed to call witnesses to prove what was the conduct of the defendant immediately after the alleged offence had been committed; that she had made immediate complaint; and, in fact, he proposed to prove all that could have been proved at the trial of the indictment preferred by her against the now prosecutor, for the purpose of showing that she was not guilty of perjury on that occasion.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

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Carter, for the prosecution, objected that this would be to try the original charge over again, under circumstances disadvantageous to the prisoner, who did not come prepared with the witnesses to meet it. It was, in fact, going into another matter.

Coleridge, Q.C., contended that this evidence was most material to the present issue, which was whether the defendant had or had not been guilty of perjury in the statement she had made; she cannot be called to contradict the prisoner, who is now admitted as a witness against her, and she can only establish her innocence by witnesses who will prove that her statement was probably true, and who would have been heard at the trial of the now prosecutor in support of the evidence she had given, and for which she was now prosecuted.

BRAMWELL, B. (having consulted *Martin*, B.) said, that he and his learned brother were agreed in opinion that all the evidence that was admissible on the hearing of the charge of assault was admissible on the trial of an indictment for perjury alleged to have been committed by a witness at the time of the alleged assault.

Verdict—*Not Guilty*.

Carter and *C. A. Turner*, for the prosecutor
Coleridge, Q.C., and *Bere*, for the defendant.

WESTERN CIRCUIT.

SOMERSET SPRING ASSIZES, 1864.

Taunton, March 23.

(Before Mr. Baron MARTIN.)

REG. v. JACKSON. (a)

*Larceny by bailee—Possession.**To sustain a charge of larceny by a bailee it is necessary to prove some act of conversion inconsistent with the purposes of the bailment.*

THE prisoner was indicted for larceny of a coat of which he was the bailee.

From the evidence it appeared that the prisoner lodged with the prosecutor, and on the 3rd of January borrowed a coat from the prosecutor for the day, and returned it. On the 10th of January he took the coat without the prosecutor's permission. He was seen wearing it by the prosecutor, who again gave him permission to wear it for the day. Some few days afterwards, he left the town and was found wearing the coat on his back on board a ship bound for Australia.

MARTIN, B., stopped the case, stating that in his opinion there was no evidence of a conversion sufficient to satisfy the statute. there are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute; the determination of the bailment must be something analogous to larceny, and some act must be done *inconsistent with the purposes of the bailment*. As, for instance, in the case of bailment of an article of silver for use, melting it would be evidence of a conversion. So, when money or a negotiable security is bailed to a person for safe keeping, if he *spend* the money or convert the security, he is guilty of a con-

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

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version within this statute; the prosecution ought to find some definite time at which the offence was committed; the taking the coat on board ship was subsequent to the prisoner's going on board himself.

Edlin, for the prosecution, contended that there was evidence of a conversion sufficient to satisfy the statute; that the fact that the prisoner was taking the coat with him on a voyage to Australia was inconsistent with the bailment, which was a bailment to wear the coat for a limited period.

MARTIN, B., said that the case did not disclose a crime contemplated by the statute, and refused the application of the prosecution to grant a case.

WESTERN CIRCUIT.

SOMERSET SPRING ASSIZES, 1864.

Taunton, March 23.

(Before Mr. Baron MARTIN.)

REG. v. COLMER. (a)

Concealment of birth—Evidence.

A fetus not bigger than a man's finger, but having the shape of a child, is "a child," within the statute.

The depositions of the prisoner at a coroner's inquest, after a caution from the coroner, may be read.

THE prisoner was indicted for concealing the birth of a child whereof one Elizabeth Fox had been delivered. The evidence went to show that the woman had been delivered in the fourth or fifth month after pregnancy, and that the foetus which came from her was about the length of a man's finger, but it had the shape of a child.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

Wux, for the prisoner, objected that the fœtus was not a child in the meaning of the act, and cited *Reg. v. Berriman*, 11 Crim. Cas. 388.)

and *Fooks*, for the prosecution, were not called upon.

THE JUDGE, B. overruled the objection, stating that he saw nothing in the word "child" in the statute to a child likely to live or to die, but that as soon as the fœtus had the outward appearance of a child it was sufficient; but the learned Baron reserved the point in the event of a conviction.

The prisoner proposed to read the deposition made by the prisoner at a coroner's inquisition on the body of Elizabeth Fox, the coroner proved that he had cautioned the prisoner previously to his making such deposition.

Wux objected to its production.

THE JUDGE, B. overruled the objection; but stated that he should reserve the other point, and he would also reserve this point, for a future day.

The jury, however, found the prisoner

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Not Guilty.

COURT OF QUEEN'S BENCH.

April 27 and May 4, 1864.

(Before COCKBURN, C.J., BLACKBURN and SHEK, JJ.)

REG. v. INGHAM. (a)

*Indictment—Coroner's inquisition—Statement of cause and manner of death—View.**The 24 & 25 Vict. c. 100, s. 6, enacts that it shall not be necessary in any indictment for murder or manslaughter to set forth the manner in which, or the means by which, the death was caused.**Held, that a coroner's inquisition was within the above enactment, and was not bad for not stating the manner or means of the death.**The omission to state the time of the commission of offence is cured by the 6 & 7 Vict. c. 83, s. 2.**It is not necessary that a coroner's jury should all be sworn at the same time, or all view the body at the same time, or that they should be sworn super visum corporis.*

RULE nisi to quash an inquisition taken before the Deputy Coroner of the county of York, on view of the body of Sarah Greenwood, and also to quash certain recognizances taken on the said inquisition on the following grounds:—1st. Because the inquisition did not set out the cause of death, or time and date. 2. Because the jury were not sworn *super visum corporis*. 3. Because the coroner was not present when each and every of the jury had a view of the body.

The inquisition was in the following form:—

County of York } An inquisition taken for our Sovereign Lady the
to wit. } Queen, at the parish of Halifax, in the said
county of York, on the 4th day of November, in the 27th year of
the reign of our Sovereign Lady Victoria, by the grace of God of the
United Kingdom of Great Britain and Ireland, Queen, Defender of the
Faith, before George Dyson, one of the coroners of our said Lady the
Queen for the said county of York, on view of the body of Sarah Green-
wood, now here lying dead within the jurisdiction of the said coroner,
upon the oaths of John Horsefall, foreman, &c., &c., good and lawful

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

n of the said county of York, who being now here duly chosen, orn, and charged to inquire for our said Lady the Queen, when, where, d in what manner the said Sarah Greenwood came to her death, say on their oaths that John Arthur Ingham, late of Longfield, in the id county of York, cotton manufacturer, did feloniously kill and slay the id Sarah Greenwood, and that the said Sarah Greenwood at the time of r death was a female person of the age of twenty-eight years, and a er frame tenter. In testimony whereof, &c.

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In support of the rule, the affidavit of John Horsfall, the foreman of the jury, stated as follows:—When the persons, with the exception of Mr. Blackburn, who had been summoned on the jury, had assembled, which they did in the club-room of the Rose and Crown Inn, in Stansfield, before going to view the body of the said Sarah Greenwood, the other jurymen elected me as their foreman. The coroner then, in the said room administered the oath to me, and immediately afterwards he administered the oath to the other jurymen, except Mr. Blackburn. At that time the jury had not viewed or seen the body of the deceased. After such oaths had been administered in the inn, the coroner and the jury who had been so sworn as aforesaid, except the said Mr. Blackburn, left the inn and walked from thence to the cottage of the deceased Sarah Greenwood, where her body lay, and in that cottage viewed the body. The oaths were not administered by the coroner to the jury when they or any of them were or was present with, nor in view or sight of the body of the said Sarah Greenwood, nor in the same building with the body, nor was any evidence taken or witness examined, or oath administered in such building, or upon view or in the presence of such body. The jury were sworn without having then, or having previously had, any view of the body of the said Sarah Greenwood. After the view of the body, and the coroner and jury had returned to the said inn, Mr. Blackburn arrived and stated he had viewed the body on his way. The coroner stated that this would not be legal, and that he must first be sworn, and then go to view the body. The coroner then administered the oath to him in the inn, and Mr. Blackburn left with the policeman, and shortly afterwards returned. The coroner did not accompany Mr. Blackburn at this view, but remained with the other jurymen in the inn. After Mr. Blackburn's return, the coroner and jury proceeded to take the depositions or evidence of the witnesses.

In opposition to the rule, the affidavit of John Richard Ingram, the deputy coroner, stated as follows:—That fourteen of the fifteen jurymen summoned having assembled at the Rose and Crown Inn, Stanfield, in the county of York, I duly swore them. That we then proceeded to view the body of the said Sarah Greenwood, which was in a cottage seventy yards from the inn. That when viewing the body, John Blackburn, the absent jurymen, joined myself and the rest of the jurymen, and viewed the body with us. That the jury then returned to the inn. That immediately thereupon, the whole fifteen jurymen being present, I duly swore the

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said J. Blackburn, and sent him, accompanied by Serjeant Priestly, to view the body again. That the said J. Blackburn was not absent five minutes. That during his absence I arranged my papers, and possibly asked the first witness, Hannah Binns, her name. That no evidence was taken till Blackburn's return. That on Blackburn's return, and not before, and in the presence of the whole fifteen jurymen, the first witness, Hannah Binns, was sworn. I then asked for the name, and the evidence was proceeded with in the usual manner. That no evidence at the inquest was taken in the absence of any one or more of the jurymen.

The affidavit of James Robert Croft, of, &c., Inspector of West Riding Police, stated, *inter alia* :—The jury assembled in a large room at the Rose and Crown Inn, in Stansfield, in the parish of Halifax aforesaid. Fifteen jurymen had been summoned. When fourteen had assembled, Mr. Ingram duly swore them, and then proceeded with them to view the body. When on their way to view the body, the fifteenth jurymen, Mr. J. Blackburn, joined the deputy coroner and the other jurors, and viewed with them, and returned with them back to the jury room at the inn. Immediately afterwards, when all the jurymen were present, and before any evidence was taken, Mr. Ingram swore Mr. Blackburn, and then requested him to view the body again. Mr. Blackburn said he had already done so, and hesitated to do it again. Mr. Ingram informed him that it was necessary. He then went at once, and I sent police-serjeant Priestly with him, urging them to be quick, as the jury were waiting. That they were not absent four minutes. That in their absence no evidence was taken, and no witness sworn. That on their return, and when the whole fifteen jurymen were present, the first witness, Hannah Binns, was first sworn, and then her evidence taken. That during the inquest no evidence was taken in the absence of Mr. Blackburn, or of any other jurymen. That all the jurymen could both see and hear the whole of the witnesses sworn and give their evidence. That Mr. Jonathan Barker, of Millwood, near Todmorden, in the county of York, millwright and engineer, was present at the inquest. He sat next to J. A. Ingham, and said he had attended as his adviser. That during the inquiry Mr. Barker suggested several questions to be asked on Mr. Ingham's behalf. That several witnesses, after having been examined, were recalled, and their depositions read over to them; but this was done in consequence of William Sharples (the steam-engine tender) not being present in the jury room when their evidence was taken, and not on account of the absence of Mr. Blackburn, or any other jurymen.

April 27.

Cleasby (Welsby with him) showed cause.—The first question is, Does a coroner's inquisition come within the word "indictment" in the 24 & 25 Vict. c. 100, s. 6, which enacts that it shall not be necessary in any indictment for murder or manslaughter to set forth the manner in which, or the means by which, the death of

the deceased was caused? It is submitted that a coroner's inquisition, upon which a person can be arraigned and tried, is an indictment: (*Sir W. Withipole's* case, Cro. Cas. 134; 2 & 3 Ed. 6, s. 24, s. 2; 1 & 2 Phil. & M., c. 13, s. 5; 7 Geo. 4, c. 64, s. 4; 2 Hale P.C. 155; 4 Bl. Com. 301; 2 Instit. 32, 387; 2 Hawk. P.C. 77, Curwood's Ed.; *Anonymous*, Popham, 209; 14 & 15 Vict. c. 100, s. 4.) The 6 & 7 Vict. c. 63, s. 2, enacts that no inquisition found upon any coroner's inquest shall be quashed, stayed, or reversed, for omitting to state the time at which the offence was committed, when time is not of the essence of the offence. As to the objections that the coroner was not present when one of the jury viewed the body, and that the jury were not sworn *super visum corporis*, the proper course was pursued in this case: (Britton, by Kelham, p. 12, ed. 1762; *R. v. Perkin*, 14 L. J., M. C. 87; Sewell on Coroners, 161.) In *Rex v. Ferrand* (3 B. & Ald. 260), which will be relied on by the other side, it will be found that the jury were not sworn properly at all.

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Temple, Q.C., and *Maule* in support of the rule.—A coroner's inquisition is not an indictment within the meaning of 24 & 25 Vict. c. 100, s. 6. The word "indictment" is sometimes used in the sense of accusation, and sometimes it means only the instrument. The 7 Geo. 4, c. 64, s. 20, enacts that no judgment upon any indictment for any felony, &c., shall be stayed or reversed for omitting to state the time at which the offence was committed; and a coroner's inquisition was not thought to be included in the word "indictment" in that statute, else the 6 & 7 Vict. c. 63, s. 2, would have been unnecessary. So the 19 & 20 Vict. c. 16, which empowers the Court to order certain offences to be tried at the Central Criminal Court, uses both the words "indictment" and "inquisition." And in the 14 & 15 Vict. c. 100, the interpretation clause says that the word "indictment" shall include an inquisition; and yet the 24 & 25 Vict. c. 100, s. 6, which was substituted for sect. 4 of the 14 & 15 Vict. c. 100, does not contain any such interpretation clause. Next, the objection that one of the jurors did not view the body when the coroner was present, is fatal: (4 Ed. 1, st. 2, s. 2; 2 Hawk. P. C. 80.)

COCKBURN, C.J.—I am of opinion that this rule ought to be discharged. The question is, whether the 6th section of 24 & 25 Vict. c. 100, which provides that, "in any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused," applies to a coroner's inquisition? I think that it does. I take it to be clear upon a review of the older authorities that the term "indictment" was understood by them and by the Legislature to comprehend a coroner's inquisition. The earliest statute which has been referred to is the 11 Hen. 4, c. 9, which was considered by all the judges in *Withipole's* case. That statute, after reciting that "of late inquests had been taken at Westminster of

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persons named to the justices without due return of the Sheriff, against the course of the common law used and accustomed before that time," goes on to provide that "the indictment so made . . . be revoked . . . and that henceforth no indictment be made by any such persons, but by inquest of the King's lawful liege people returned by the Sheriffs," &c. It would appear to have been urged by some of the judges in the case above referred to, that this enactment was made with reference to the case of an inquest taken against the common law before the justices at Westminster, and not with reference to the case of an inquest taken before a coroner's jury; yet the majority of the judges held that the word "indictment" used in the act included an inquisition before the coroner, and that the act applied. Again, when we turn to 2 & 3 Edw. 6, c. 24, we find the word "indictment" applied to the finding, either by the jurors of the coroner or of the county; and an indictment before a coroner can only refer to an inquisition. So also in 1 & 2 Phil. & M., c. 13, s. 5, the Legislature uses the words, "inquisition or indictment, before the coroner taken and found." So far the statutes shew that the Legislature used the term "indictment" as applicable to a coroner's inquisition. Then Lord Coke uses the word in the same sense. Thus in 2 Inst. 31 he says, "And what authority had the coroner? The same authority he now hath, in case when any man come to violent or untimely death, *super visum corporis*, &c. This authority of the coroner, namely, the coroner solely to take an indictment *super visum corporis*," &c. Again, at page 550, a coroner is spoken of as taking an indictment of the death of a man. I think, therefore, it is shewn that both the Legislature and that great authority Lord Coke thought that the finding of any jury whatever is properly designated as an indictment. Then in recent times the Legislature, in their desire to reform the criminal law, and get rid of technicalities, passed the 14 & 15 Vict. c. 100, in reference to this subject. By the 4th section of that Act, the old technical requirements in an indictment for murder or manslaughter were done away with. The term in the section itself is "indictment;" but in sect. 30, the interpretation clause, "indictment" is defined to include "information," "inquisition," and "presentment." Thus the law stood until the 24 & 25 Vict. c. 100, re-enacting in sect. 6 the provisions of the above sect. 4, which was repealed by 24 & 25 Vict. c. 95. Unfortunately, the new statute omits to state that "indictment" shall include an inquisition, and it is now contended that the Legislature really intended to leave matters as they had been before 14 & 15 Vict. c. 100 so far as regarded coroners' inquisitions. I cannot think that this could have been their intention. The alteration effected by the 14 & 15 Vict. c. 100, had not been found inconvenient, and there was no reason why the Legislature should have intended to restore the necessity for technical niceties. I do not see the force of the argument, that because a coroner's jury have not had an indictment carefully prepared for them like the grand jury, that therefore the Legislature should

require more minuteness. I think it more probable that the words contained in the interpretation clause of 14 & 15 Vict. c. 100 were omitted, because they were thought unnecessary by the framers of the new Act. No doubt some difficulty presents itself upon the statutes 7 Geo. 4, c. 64, and 6 & 7 Vict. c. 83, the former of which was passed generally for the improvement of the criminal law, and it contained in sect. 20 an enactment to the effect that when "time" was non-essential it need not be stated in an indictment. If this statute had stood alone, there would be no difficulty in applying sect. 20 to the case of a coroner's inquisition. But in the 6 & 7 Vict. c. 83 (an Act passed with reference to the office of Coroner) there was introduced in sect. 2 a re-enactment of the provisions of 7 Geo. 4, c. 64, s. 20, applying them to an inquisition. Upon this it is very fairly remarked, that those who framed the latter statute thought that sect. 20 of the earlier statute did not apply to a coroner's inquisition, and possibly this may be true; but the act was not declaratory, and we are not to draw the inference from what may have been an excess of caution on the part of its framers that an indictment is not to include an inquisition. There is no reason for technicalities in the one case more than in the other, and I do not suppose that the Legislature meant to restore technicalities in inquisitions. Taking this view, we may act upon the authorities of the text writers, and on the expositions of the Legislature, and hold that the term "indictment" includes a coroner's inquisition. As to the second objection, that one of the jury viewed the body separately from the others, I think it is met by the 6 & 7 Vict. c. 83, s. 2, which provides that no inquisition shall be quashed, "because the coroner and the jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the inquest." The true construction of these words is, that it is enough if they all view the body at the first sitting, and that the coroner and jury need not all be present at one time, and that the coroner need not be present at the time when all view. It is important that he should be present whenever a juror views the body; but, on the other hand, it is not absolutely essential to the due administration of his office. I think the language of the Act large enough to comprehend this case, and that this objection fails also. I am, therefore, of opinion that this rule should be discharged.

BLACKBURN, J.—I am of the same opinion. The first question is, whether the word "indictment" in the 24 & 25 Vict. c. 100, s. 6, includes an accusation made by a coroner's jury. In old times it seems that the word included all charges made by any inquest, and that when the charge was reduced into writing it was called an indictment. In all charges of felony, the preliminary step is that twelve men at least should be sworn upon oath to make the inquiry. The ordinary case is that of a grand jury, summoned and sworn before our Lady the Queen to inquire into all crimes and offences, such as they can inquire into, and present offenders. Then, when they are thus sworn, they make inquiry, and if they find a particular charge, it is reduced into

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writing and it becomes a record. In practice the charge is now written when it is brought before them, and all the jurors do is to write on the back of it "true bill" or "no bill," as the case may be. But the record still purports that the jurors "do present &c." The present tense is used throughout, as if the jurors verbally stated their presentment, and then it was taken down in writing. Upon the coroner's inquest, the jury have to inquire into the cause of death, and they find it in the present tense. Their presentment is equally an accusation as that of a grand jury, upon which a party may be tried. Then arises the question, whether the inquisition may be properly termed an indictment? Lord Coke evidently considered that it might be so. The point was also considered in *Withipole's* case (Cro. Car. 134), which was decided upon the construction of the 11 Hen. 4, c. 9. That statute begins with a recital describing inquests taken at Westminster of persons named to the justices, without due return of the sheriffs. Then follows an enactment applying solely to the indictments mentioned in the recital. Upon this the question was raised, in *Withipole's* case, whether the above section applied to a coroner's inquisition, and the majority of the judges held that it did. The minority assumed that the word indictment would in general include an inquisition; but they said, and I think with a great show of reason, that in that particular statute its meaning was cut down to inquests before the Justices. This view, however, was not adopted by the majority, and there was a difference of opinion on it; but all the judges were of opinion that generally the word "indictment" was sufficient to include a coroner's inquisition. Then comes the question, is the word "indictment" used in the 24 & 25 Vict. c. 100, s. 6, in a more restricted sense? In common parlance, no doubt an indictment does not include an inquisition. But I do not think the Legislature used the word in this limited sense, for the Act, we must remember, applies to the whole administration of criminal procedure, and when the Legislature was about to remove objections of a technical nature, I should expect to find that they would put an end to technical objections in the case of inquisitions as well as indictments. There seems to have been an opinion that 7 Geo. 4, c. 64, s. 20, which spoke of indictments, did not apply to coroner's inquisitions. The point, however, has never been judicially decided. Then in the 6 & 7 Vict. c. 83, the Legislature thought it worth while to repeat the enactments of the former statute in language which shows that they did not think the word "indictment" could be so extended. But the statute does not say that the word shall not include an inquisition. Next, in Lord Campbell's Act (14 & 15 Vict. c. 100) there was prudently inserted an interpretation clause, which it is unfortunate that the framers of the new Act omitted. Nevertheless, considering the object of the Act, I think we should hold that the word "indictment," in sect. 6 of the new Act, does apply to accusations found by the coroner's jury as well as by the grand jury. On the second point, I agree with what has fallen from my Lord. The language

the 6 & 7 Vict. c. 83, perfectly meets the objection now made. The rule must accordingly be discharged.

SHER, J.—I am of the same opinion. I think that the construction of the word “indictment,” in the 24 & 25 Vict. c. 100, s. 6, ought to be the same as is put upon the word in the 14 & 15 Vict. c. 100, s. 4, by the interpretation clause of that statute, but which has not found its way into the 24 & 25 Vict. c. 100. It has been intended, because that clause has not been introduced, the word “indictment” is to be remitted, so to speak, to its ordinary meaning. Mr. Temple has argued that in all the statutes in which “indictment” has been held to apply to coroner’s inquisitions, the word means the accusation, and not the instrument, while the question arises upon the instrument itself. But, in the 3 Edw. 6, c. 24, s. 2, the word clearly applies to the instrument; and in the 1 & 2 Phil. & M. c. 13, s. 5, persons are spoken of as being indicted upon inquisitions found before a coroner, and therefore the proposition sought to be established by Mr. Temple is not made out. When we come to recent times, we find that, in the passing of the 14 & 15 Vict. c. 100, to that of the 24 & 25 Vict. c. 100, the word has been settled as including both, and therefore we have a contemporaneous exposition of the law to that effect. I think we must now construe the word “indictment” having the same extended meaning as was given to it in the 14 & 15 Vict. c. 100, and which it certainly had for ten years. On the other point, I agree that the 6 & 7 Vict., c. 83, s. 2, puts an end to the objection.

Rule discharged.

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COURT OF QUEEN'S BENCH.

June 4, 1864.

(Before BLACKBURN and SHEE, JJ.)

LATHAM AND OTHERS v. THE QUEEN. (a)

*Indictment—Conviction on one count only—Quarter Sessions—
Jurisdiction—Conspiracy.*

An indictment charged several persons, in the first count with obtaining money from B. by false pretences and in the second with a conspiracy, by false pretences, the said B. of his monies to defraud. They were found guilty upon the second count only. The record set out the finding and judgment on the second count, but omitted to notice any finding or judgment on the first count :

Held (on error), that the verdict and judgment on the second count were good, for that each count for the purpose of the verdict was a distinct indictment. A good verdict and judgment on one count is not affected by any defect in the verdict or judgment on another count.

An indictment for conspiracy in the general form to obtain money by false pretences is within the jurisdiction of the Quarter Sessions.

WRIT of error on a conviction for misdemeanor.
The indictment was as follows :—

Lancashire } The jurors for our Lady the Queen upon their oath pre-
to wit. } sent, that heretofore, before, and at the time of the
committing of the offences hereinafter stated, Richard Bealey carried
on the business of a bleacher and manufacturing chemist, to wit, at Rad-
cliffe, in the county of Lancaster, and during all the time aforesaid Ben-
jamin Latham, Edward Hacking, Henry Ball, Hiram Hardman, Peter
Pendlebury, John Mills, John Wild, and Edmund Taylor were servants of
the said Richard Bealey, at his works, to wit, at Radcliffe aforesaid,
and were during all the time aforesaid employed by the said R. Bealey
in making and manufacturing a certain product, to wit, salt cake ; and in
the manufacturing of the same it became and was necessary divers large
quantities of salt to use, consume, roast, and boil. And the jurors afore-
said, upon their oath aforesaid, do further present, that the wages paid by
the said R. Bealey to the said B. Latham, E. Hacking, H. Ball, H. Hard-
man, P. Pendlebury, J. Mills, J. Wild, and E. Taylor were paid and calcu-
lated upon the number of charges of salt supplied by the said R. Bealey

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

&c., to each of the furnaces at which the said B. Latham, &c., were respectively employed. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said B. Latham, &c., being evil disposed persons and intending to cheat and defraud the said R. Bealey of his money, unlawfully, knowingly, and designedly did falsely pretend to the said R. Bealey that they had used at the furnaces of the said R. Bealey divers charges of salt of the weight of seven hundred pounds each charge, by means of which said false pretence the said B. Latham, &c., did then unlawfully obtain from the said R. Bealey 130*l.*, as and for wages of the money of the said R. Bealey, with intent thereby to defraud; whereas, in truth and in fact, the said B. Latham, &c., had not then used at the furnaces of the said R. Bealey charges of salt of the weight of 700 pounds each charge, as they and each of them, to wit, at the time they did so falsely pretend, well knew, to the great damage and deception of the said R. Bealey, to the evil example of all others in the like case offending, against the form of the statute, &c.

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Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said B. Latham, &c., being evil disposed persons, and contriving and intending to defraud the said R. Bealey of his money, unlawfully, knowingly, and designedly did amongst themselves combine, conspire, confederate, and agree together by certain false pretences, against the form of the statute, &c.

The record then proceeded :

Whereupon the sheriff of the said county is commanded to apprehend and take the bodies of the said B. Latham, &c., and thereupon at the same General Quarter Sessions of the Peace of our Lady the Queen, holden by adjournment at the New Bailey Court House, within Salford, in and for the said county palatine of Lancaster, the said 26th October, 1863, before the said Justices last above-mentioned, come the said B. Latham, &c., in the custody of the keeper of the house of correction at Salford aforesaid, and having had hearing of the indictment aforesaid are instantly to speak to this Court how they will acquit themselves of the premises aforesaid in the indictment aforesaid, above charged and imposed upon them; and the said B. Latham, &c., say that they are not guilty of the premises aforesaid in the indictment above alleged against them, and therefore of the good and evil thereof do put themselves upon the country.

And Edward James, Attorney-General of and for the county palatine of Lancaster aforesaid, who, for our said Lady the Queen herein in this behalf doth follow for our said Lady the Queen, doth so likewise.

Therefore immediately come here the jury before the said last mentioned Justices, and who, and so forth, to make a jury so forth, because, and so forth; and the said jury, by Sir William Brown, Bart., Sheriff of the said county in this behalf, impannelled and returned, to wit, Richard Townsend, &c., being called come, who being chosen, tried, and sworn to speak the truth, in and upon the premises aforesaid, in the said indictment above specified, do say upon their oaths that the said E. Taylor is not guilty of the premises aforesaid in the indictment aforesaid above laid to his charge, as according to the form and effect of the said indictment is alleged, and that the said B. Latham, &c., are guilty of the premises aforesaid in the second count of the said indictment above laid to their charge, as according to the form and effect of the said second count of the said indictment is alleged.

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Whereupon it is considered by the Court here that the said E. Taylor of the premises aforesaid above specified be discharged, and go without day, &c.; and it is further considered and adjudged by the Court here that the said B. Latham, &c., be remanded into the custody of the Governor of the House of Correction at Salford, and be kept in safe custody and hard labour for the term of two calendar months each.

Assignment of error.—And now (that is to say) on the 15th January in this same Term, before our said Lady the Queen, at Westminster, come the said B. Latham, E. Hacking, H. Ball, H. Hardman, P. Pendlebury, J. Mills, and J. Wild upon both and each of the several counts of the said indictment, and say that the jury aforesaid were sworn to try the truth of both and each of such issues, and to give their verdict thereon, and that it does not appear by the record and proceedings that the said jury gave any verdict whatsoever on both or each of the said several issues, but only upon one of them; that is to say, upon the issue joined upon the second count of the said indictment. Therefore in that there is manifest error.

There is also error in this, that it appears by the record and proceedings that the second count of the said indictment, on which the said B. Latham, &c., are found guilty, does not contain any misdemeanor or other offence in law. Therefore in that there is manifest error.

There is also error in this, that it appears by the record and proceedings that the said second count of the said indictment whereof the said B. Latham, &c., are found guilty, does not contain any misdemeanor or offence which by the laws and statutes of this realm the said Justices of the Peace at their General Quarter Sessions of the Peace aforesaid had any authority or jurisdiction to hear and determine. Therefore in that there is manifest error.

There is also error in this, that it appears by the record and proceedings that the indictment aforesaid and the matter therein contained are not sufficient in law to warrant the judgment given against the said B. Latham, &c., or against any or either of them, or to convict them or any or either of them of the misdemeanors or offences aforesaid, or any or either of them. Therefore in that there is manifest error.

There is also error in this, that by the said record and proceedings it appears that judgment upon the second count of the said indictment was given against the said B. Latham, &c.; whereas judgment by the laws of this realm ought to have been given for the said B. Latham, &c., and that they and each of them be therefore acquitted, and go thereupon without day. Therefore in that there is manifest error.

And the said B. Latham, &c., pray that the judgment aforesaid for the said errors and other errors appearing in the record and proceedings aforesaid may be reversed, annulled, and wholly held for nothing, and that they and each of them may be restored to all things which by reason of the judgment and proceedings aforesaid they have lost.

Joinder in error.

Cottingham now appeared for the defendants (plaintiffs in error.) First. The record is bad, inasmuch as the defendants, being convicted upon the second count only, it takes no notice of their acquittal upon the first count; for being convicted only upon the second count, they were entitled to have an entry of acquittal upon the first count, and by such omission, if again indicted for the

offence contained in such first count, they would be unable to plead either *autrefois acquit* or *autrefois convict*: (*R. v. Hayes*, 2 Ld. Raym, 1518; *O'Connell v. The Queen*, in error, 11 Cl. & Fin. 295-6, Parke, B.) Secondly. The Quarter Sessions have only a limited jurisdiction in cases of conspiracy. By the 5 & 6 Vict. c. 38 (the Quarter Sessions Jurisdiction Act), s. 1, it is enacted that

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Neither the Justices of the Peace acting in and for any county, riding, division, or liberty, nor the Recorder of any borough shall, at any sessions of the peace, or at any adjournment thereof, try any person for (*inter alia*) unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such Justices or Recorder respectively have or has jurisdiction to try when committed by one person.

It should appear upon the record that the conspiracy was one which they had a right to try, and in the present case it did not so appear; for the conspiracy set out in the record of the indictment might be to do some act not indictable at Quarter Sessions, such as to defraud by a bankrupt, and therefore the nature of the fraud ought to have been set out, that the court might see that there was jurisdiction. Thirdly, it is not averred on the record that the defendants were present when judgment was pronounced, actual presence being requisite, though the case was one of misdemeanor, corporal punishment being awarded: (1 Chit. Crim. Law, 696, 720.)

Campbell Foster, contra, was directed to confine his argument to the first objection only. There being a good count upon which judgment passed, it is immaterial that there are other counts which were passed over in silence, for separate counts in an indictment stand upon the footing of separate indictments. It is no objection that judgment is not given upon one, if a right judgment is given upon others, for at any future time the omission can be supplied if necessary: (*Peak v. Oldham*, Cowp. 275; *O'Connell v. The Queen*, Tindal's judgment, 255; *Holloway v. The Queen*, 3 Cox Crim. Cas. 241; *Gregory v. The Queen*, 5 Cox Crim. Cas. 247, 252.)

Cottingham in reply.

BLACKBURN. J. (a)—I think that in this case the Crown is entitled to judgment. There were in this indictment two counts, and the jury ought regularly to have pronounced a verdict on both. No doubt, in fact, the verdict was one of guilty on the second count and of not guilty upon the first count; and it is by a misprision of the clerk who drew up the record that the first count is untouched. If in due time an application to amend had been made, it would have been set right, and even now, if any inconvenience should arise to the prisoners with reference to future proceedings, it may be amended. At present I cannot speculate upon that. Then comes the question as to the effect of the omis-

(a) Cockburn, C.J., and Crompton, J., were sitting in the Court of Criminal Appeal.

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sion of the finding of the jury on the first count. As to that, where there is an issue which the jury have to try, and they imperfectly dispose of it, the court will award a *venire de novo*. We need not, however, inquire into that, for here there has been no imperfect finding. But when there are two counts in an indictment, they are to all intents and purposes two separate indictments, and the finding upon them would be as though they were separate indictments. An imperfect finding upon a count might be a ground for a *venire de novo*; but if there is a good finding upon a good count, why may a defendant not be convicted upon that? There is nothing that I can see in principle against it. It is said that the question is concluded by authority, and one case is cited from Lord Raymond. [His Lordship here referred to the case, and continued.] But I think that case has no bearing upon the present one. An indictment has no analogy to a civil claim, where the claim is entire, whereas, in a criminal case, each count is in effect a separate indictment. In *O'Connell v. The Queen* (11 Cl. & Fin.) Lord Wensleydale (then Mr. Baron Parke) shows that this was his view in his judgment, at page 296: "So in respect of those counts on which the jury have acted incorrectly by finding persons guilty of two offences (on a count charging only one) if the Crown did not obviate the objection by entering a *nolle prosequi* as to one of the offences (*Rex v. Hempstead, R. & Ryan*. C. C. 344), and so in effect removing that from the indictment, the court ought to have granted a *venire de novo* on those counts, in order to have a proper finding; and then upon the good counts it should have proceeded to pronounce the proper judgment. In short, I should have said that the defendant should, on the face of the record, be put precisely in the same condition as if the several counts had formed the subject of several indictments." I certainly cannot see why the judgment upon one count should not be supported merely because there is no judgment upon another. The second question is, as to whether or not the second count (for the conspiracy) sets out an offence within the jurisdiction of the Court of Quarter Sessions? It is a count for a conspiracy. [His Lordship here read the count.] The object of this conspiracy is stated to be to defraud the prosecutor of his money, and the objection is, that inasmuch as the Quarter Sessions have only a limited jurisdiction in cases of conspiracy, the count should set out the facts of the fraud, so as to show whether the offence came within its jurisdiction. The count alleged that the defendants conspired, by divers false pretences, to defraud Richard Bealey of his money, against the form of the statute. Now, in conspiracies, it is not required that the object of the conspiracy should be set out so precisely as if the indictment were for the substantive offence; all that is required is to show that there was a conspiracy to defraud, and, before finding the bill, the grand jury must be satisfied that the conspiracy was to defraud the prosecutor of his money by false pretences. Other technical objections were taken, such as not setting out the false pretences, and that there was no allegation that the defendants

present when judgment was passed; but there is really
 in them, and the case of *Sydeserff v. The Queen* (6 Cox
 Cas. 12) is in point. There must therefore be judgment
 for the Crown.

LEE, J.—I am of the same opinion. It appears there were
 counts in the indictment, and that judgment is entered only
 on one of them. Now the two counts are in principle the same
 indictments, and the record shows that the defendants were
 and convicted upon one count. It is said that the record is
 because it does not appear that any judgment was given upon
 the first count. It certainly does appear that no sentence was
 passed upon it, and although it does not say that the defendants
 were acquitted, it is rather an imperfect statement than a statement
 of acquittal, and if hereafter there is any difficulty, it may easily
 be cleared up. Upon the second point the objection was, that inas-
 much as it does not appear upon the face of the second count that
 the offence which the defendants conspired to commit was one over
 which the Quarter Sessions had jurisdiction, it was bad, for that
 the Quarter Sessions could only try a conspiracy to do an Act which would
 be triable at Sessions. Now it is not necessary that the
 charge in a charge of conspiracy should be set forth with the same
 particularity as would be required in stating the substantive
 offence. Here the gist of the offence is the conspiracy, and I think
 the count is sufficient.

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COURT OF QUEEN'S BENCH.

May 24 and 25, 1864.

RE TERNAN and OTHERS. (a)

(Before COCKBURN, C.J., CROMPTON, BLACKBURN, and SHEE, JJ.)

Extradition Acts—6 & 7 Vict. c. 76—Piracy.

Under the 6 & 7 Vict. c. 76 (an Act for giving effect to a treaty between England and the United States, for the apprehension of certain offenders), there is no power to commit accused persons to gaol for the purpose of being delivered up to the United States authorities, unless the United States have exclusive jurisdiction to try and punish the accused.

It is not necessary that there should be any warrant issued or depositions taken in the United States, in order to found a requisition by the United States authorities for the delivery up of any accused person under the Act 6 & 7 Vict. c. 76.

It is not necessary for the magistrate who commits an accused person to gaol in pursuance of the Act, to state in his warrant that the evidence on which it issued was given upon oath.

The word "piracy," in the treaty, does not mean piracy jure gentium, but a crime made such by the municipal law of one only of the parties to the treaty, and over which that party has exclusive jurisdiction.

THE prisoners had been arrested at Liverpool, on a warrant from the Home Office, granted on the requisition of the United States Minister, on a charge of piracy, alleged to have been committed by them and others, under the following circumstances:—

On the 16th November, 1863, the prisoners, with others, had taken a passage, ostensibly as passengers, in a merchant steamer of the United States, called the *Joseph L. Gerrity*, from Matamoras, in Mexico, laden with cotton, and bound for New York. When the vessel was about fifty miles out at sea, and seventy miles from Matamoras, in the Bay of Mexico, the prisoners, in the night time, rose upon the crew, seized the ship, treating the captain and crew with no more violence than was necessary for the purpose of capture, sent them adrift off the coast of China, and

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

took the ship to Belize, where they sold the cargo, and abandoned her.

The prisoner, and all the others acting with him, were subjects of the Confederate States, with whom the United States were at war, and the act was done by them in course of hostilities, and under the powers claimed by belligerents. Afterwards the prisoners came to Liverpool, and being recognised there by the master of the captured ship, information was given to the United States Minister, who claimed their arrest and delivery up under the provisions of the Extradition Treaty of 1843, which thus acts:—

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That in case requisition shall at any time be made by the authority, of the said United States, in pursuance of and according to the said treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crimes of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State, or in Ireland for the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to signify that such requisition has been so made, and to require all Justices of the Peace and other magistrates and officers of justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol, for the purpose of being delivered up to justice, according to the provisions of the said treaty; and thereupon it shall be lawful for any Justice of the Peace, or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of that part of Her Majesty's dominions would justify the apprehension and committal for trial of the person so accused, of the crime of which he or she shall be so accused had been there committed, and it shall be lawful for such Justice of the Peace, or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, here to remain until delivered pursuant to such requisition as aforesaid. That upon the certificate of such Justice of the Peace, or other person having power to commit as aforesaid, that such supposed offender has been so committed to gaol, it shall be lawful for one of Her Majesty's principal Secretaries of State, or in Ireland for the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the Government of any such colony or possession, by warrant under his hand and seal to order the person so committed to be delivered to such person or persons as shall be authorized in the name of the said United States to receive the person so committed, and to convey such person to the territories of the said United States, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person or persons authorized as aforesaid to hold such person

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in custody, and take him or her to the territories of the said United States, pursuant to the said treaty; and if the person so accused shall escape out of any custody to which he or she shall be committed, or to which he or she shall be delivered as aforesaid, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he or she shall so escape may be retaken upon an escape.

Thereupon the following warrant was issued by the Home Secretary:—

To Her Majesty's Justices of the Peace and other magistrates and officers of the peace in and for the borough of Liverpool, and to all other Her Majesty's Justices of the Peace and other magistrates and officers of justice within the United Kingdom of Great Britain and Ireland.—Whereas, on the 15th day of February, 1864, in pursuance of a treaty between Her Majesty and the United States of America, made on the 9th day of August, 1842, and ratified on the 10th day of October in the same year, and of an Act of Parliament passed in the Session holden in the 6th & 7th years of Her Majesty's reign, intituled "An Act for giving effect to a Treaty between Her Majesty and the United States of America for the apprehension of certain Offenders," a requisition was made by Charles Francis Adams, Esq., the United States' Minister at this Court, to deliver up to justice certain persons called or known by the names of James Clements, T. Wilson, Daniel O'Brien, and ——— Kelly, charged with the crime of piracy on board the schooner *Joseph L. Gerrity*, of New York, within the jurisdiction of the United States of America, I, therefore, the Right Hon. Sir George Grey, Bart., one of Her Majesty's principal Secretaries of State, do hereby, in pursuance of the power and authority given to me as such Secretary of State by the said Act, require you, and all of you, within your several jurisdictions, to govern yourselves accordingly, and to aid and assist in apprehending the said James Clements, T. Wilson, Daniel O'Brien, and ——— Kelly, and committing them to gaol for the purpose of there being dealt with according to the provisions of the said treaty, and delivered up to justice, pursuant to the said Act, if found to be within the same. In witness whereof I have hereunto set my hand and seal this 20th day of February, 1864.

G. GREY.

On receipt of this warrant, Mr. Raffles, the Stipendiary Magistrate for Liverpool, issued his warrant, as follows:—

11th and 12th Victoria, caps. 42, 43. Warrant remanding a prisoner.

Borough of Liverpool to wit. lock-up house for the said borough.	}	To the constables of the said borough of Liverpool and to the keeper of the head lock-up house for the said borough.—Whereas, Warren Quinsey, or Wilson; George M'Murdock, or Kelly; and John Ternan, or Clements, were this day charged before the undersigned, one of Her Majesty's Justices of the Peace in and for the said borough, with having committed the crime of piracy on board a certain American ship on the high seas, within the jurisdiction of the United States of America, contrary to the statute in that case made and provided, and against the peace, &c., and it appears to me to be necessary to remand the said persons charged: These are, therefore, to command you, the said constables, in Her Majesty's name forthwith to convey the said persons charged to the said lock-up house for the said
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borough, and there to deliver them to the keeper thereof, together with this precept. And I hereby command you, the said keeper, to receive the said persons charged into your custody in the said lock-up house, and there safely keep them until the 30th day of April inst., when I hereby command you to have them at the Police Court in Dale-street, in the said borough, at 11 o'clock in the forenoon of the same day, before me or before such other Justice or Justices of the Peace as may then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime. Given under my hand and seal this 23rd day of April, A.D. 1864, at Liverpool, in the borough aforesaid.

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Under this warrant, the prisoners were arrested and brought before Mr. Raffles. The master of the seized vessel proved their identity; which indeed, was undisputed, as was the act of seizure, and also, that it was, upon the face of it, an act of piracy. But it was also proved, by the same witness, that the prisoners professed and appeared to act under the orders of a Major Hogg, who called himself, and was believed to be, an officer in the service of the Confederate Government. Mr. Raffles doubted whether, under these circumstances, it was a case of piracy within the act, and he remanded the prisoners for the purpose of their obtaining the opinion of the Queen's Bench upon it.

Accordingly, at the close of last term—

James, Q.C., Littler, and T. H. James, applied on behalf of the prisoners, for a rule for a *habeas corpus* to bring them up to this Court to be discharged,

Lush, Q.C., Milward, and Vernon Lushington, appeared for the United States, and showed cause against the rule, which, after an elaborate argument, was made absolute.

The writ of *habeas corpus* issued accordingly to the gaoler at Liverpool, and under it the prisoners were now brought up before this Court.

The same counsel appeared on both sides.

James, Q.C., moved that the prisoners be discharged. They are committed for piracy *jure gentium*, and that is not the piracy designated by the act. The charge is of piracy generally, and that must be taken in its largest sense. If piracy made such by the municipal law of the United States was intended to be charged, it should have been so stated. This Court cannot take notice of piracy that is only called such or made such by the municipal laws of other States; it knows only of that which is piracy by the law of nations and by its own law. England knows nothing of a crime, called piracy in the United States, but which would be piracy in no other country. The treaty was designed to prevent the failure of justice by the escape of criminals out of the only jurisdiction in which they were triable. But piracy, *jure gentium*, is a crime against all the world, and may be tried and punished anywhere. If the prisoners have been guilty of piracy *jure gentium*, there is no need to deliver them up to the United

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States; they can be tried and punished here, and there ~~will~~ be no failure of, or escape from, justice. The treaty refers to crimes committed within the exclusive jurisdiction of the country demanding extradition. This was the construction put upon the treaty by the highest American authorities. In *Ken's Commentaries*, 8th edit. p. 36, this doctrine is emphatically stated. Jurisdiction is either territorial or personal; that is, either local or based on allegiance: either jurisdiction over all within its territory, or over its own subjects beyond its territory; and a ship is part of its territory. A subject took his ship with him, and allegiance and jurisdiction followed and attached to both. But the United States could not by its own law make that piracy or murder here which is not such by our laws, except as regards their own subjects in their own ships. There was a case in point. In the reign of William III., an Act passed making it piracy for vessels under the authority of James II. to commit depredations on British vessels; but that Act applied only to British subjects, and a foreigner could not have been treated as a British subject under its provisions. The United States, according to *Wheaton*, had, in effect, adopted this Act, and made it piracy for vessels "under colour" of any commission from a foreign state to commit depredations on ships and subjects of the United States. It was admitted that this Act applied only to subjects of the United States. Apply this to the present case. The terms of the treaty are, "deliver up to justice" (not to the authorities). This showed that the object was to prevent a failure of justice, that is to say, where the law and justice of both countries would recognise that, without extradition, there would be a failure of justice, and that would be where there was concurrent jurisdiction. In case of piracy *jure gentium*, there is concurrent jurisdiction. If a British subject commits murder in America, the extradition of the prisoner could not be claimed. Should we deliver up our own subjects to be tried abroad for a crime that was triable here? Would that be a "delivery up to justice?"

COCKBURN, C.J.—The argument of the other side is that the criminal would escape from justice, in this sense, that all the evidence and proofs were abroad and justice would be certain to fail here.

James.—That might be a good reason for a treaty to meet such a case, but the present treaty does not include it. The whole scope of the statute is compulsory and allows of no discretion.

BLACKBURN, J.—No provision was made for the consideration of any difficulties as to evidence.

James.—And that is strong to show that the treaty was not designed to apply where there was concurrent jurisdiction. Difficulty of proof was an accident. It may be that all the witnesses might be here. Another strong argument was the provision that, in case of failure of demand in two months, the prisoner should be discharged. Could it have been contemplated that a criminal triable by our own courts, and by our own law, should be discharged

use a foreign state did not think fit to demand him? Yet that would be the consequence of the construction, if the other side is correct. In a case of a demand by us for the extradition of a person for an assault with intent to murder, committed in Ireland,

Supreme Court of the United States construed a treaty similar to this in the sense now contended for. The Court said: "It is a compact between two nations for the punishment of criminal offenders against their laws, where the guilty parties could be tried and punished only within the jurisdiction whose laws have been violated." In the case of *Re Robins* (5 Wheaton's Reports), in reference to offences at sea, it was laid down that the jurisdiction of a nation was purely general: "Piracy, by the law of nations, is punishable equally by all, but no particular nation can increase or diminish the list of crimes so triable."

DOCKBURN, C.J.—The case would be far stronger in your favor had it been one of concurrent jurisdiction.

James.—The murder certainly was not committed in the United States, but the whole argument was based upon, and applicable to, concurrent jurisdiction. Again, *Wheaton* says (p. 236):—

In the negotiation of treaties stipulating for the extradition of persons arrested or convicted of specific crimes, certain rules are generally followed. The principal of these rules are that a State should never authorize the extradition of its own citizens or subjects, or of persons accused or convicted of political or purely local crimes, but should confine the provision to such acts as are by common accord regarded as grave crimes. The Act, which will be observed, specifies the crime of murder, along with robbery and piracy.

In the construction of the British Treaty of Extradition a crime committed at sea on board an American vessel has been considered the same as if committed in American territory; and therefore (it was said) was a case for extradition.

But there were other points. Supposing this to be a case of piracy under municipal law, and not *jure gentium*, and none of the men were American subjects?

BLACKBURN, J.—If piracy in the treaty does not mean piracy *jure gentium*, it can have no other meaning in the warrant. None of the proceedings show us that there is any municipal law of the United States creating a crime of piracy which is not such by the law of nations; nor that such a species of piracy had been committed in fact. The proof of this is upon the parties claiming the extradition. For example, this species of piracy applies only to American subjects.

DOCKBURN, C.J.—If that be so, the case is out of Court.

James.—Just so; and if it is piracy *jure gentium*, it is not shown, it may be tried here. The warrants also are bad. They show no jurisdiction in the Secretary of State to issue them. There must be an original charge by the country seeking extradition, sworn to on oath, and a warrant issued in America. These must be proved by affidavit to the Secretary of State, and thereupon his

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jurisdiction arises to issue a warrant, and that gives jurisdiction to the magistrate. The words of the Act are, "who, being charged, shall seek an asylum," i. e., first being legally charged and then escaping. *Wheaton*, in his *International Law* (p. 242) says:—

The United States will not make a demand upon the British Government without the exhibition of a judicial warrant upon sufficient proof by the local authority of the State demanding extradition. A mere notification from a foreign Legation is not sufficient to justify the preliminary action of the State from whom extradition is claimed.

Lush.—In point of fact, the Secretary of State never acts without evidence.

James.—But the evidence in this case was taken here. I contend there is no jurisdiction to act at all without sworn evidence and a warrant from America. The prisoners could be tried here, upon evidence taken here.

COCKBURN, C.J.—If you are right, in the case of a murder by one American subject of another, on board an American ship in the Bristol Channel, if the criminal escaped before a warrant could be issued, his extradition could not be claimed.

James.—This shows only a defect in the Act. The warrant is defective also for not stating that it was issued on sworn evidence. The magistrate must show jurisdiction on the face of it. He has no general right to issue warrants in such cases. In the exercise of such special jurisdictions, the warrant is always required to show that the statutable requisites to jurisdiction had been complied with.

CROMPTON, J.—This defect can be cured by the issue of a new warrant in half an hour.

James.—Lastly, it is not piracy at all. There is no evidence whatever upon which a magistrate could commit for piracy. Acts which would be presumptive evidence of piracy in peace are not such in war, if committed against a belligerent. The Confederate States are recognized by us as belligerent. I appear for them, and on their behalf avow that this was a belligerent act, which they recognize and adopt. The evidence even of the claimants goes to establish this fact. It is not, indeed, gravely disputed. *Prima facie*, the act of seizing the vessel of a belligerent is an act of war.

COCKBURN, C.J.—Is it so where the men on board are passengers?

James.—Why not? It is a mere *ruse de guerre*. The prisoners acting as denizens of a belligerent power, and on its behalf, can not be pirates for an act of war on the other belligerent.

COCKBURN, C.J.—But suppose it to be *mala fides*, and more colourable?

James.—That cannot be presumed. Fraud must be proved.

COCKBURN, C.J.—The real question on this point is, who on the evidence the magistrate was not warranted in sending men for trial?

James.—The act being done upon a belligerent, the presum

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uld be that it was an act of war, otherwise every belligerent
w would be put to proof of authority in every foreign port.
izes taken without commission have been held to be liable to
zure by the Admiralty as one of the droits of the Crown
Rob.), which they would not be if the seizure was piracy, for
property would then have remained in the owners. *Kent* in
Commentaries says :—

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It is said not to be lawful to make captures without a commission. The
ject has been repeatedly discussed in the Supreme Courts of the
ied States ; and the doctrine of the law of nations is held to be, that
vate citizens cannot acquire a title to hostile property unless seized
er a commission. If they depredate upon the enemy without a
ommission they act at their own peril, and are liable to be punished by
ir own sovereign ; but the enemy is not warranted to consider them as
minals. As respects the enemy, though such captures without commis-
n are exceedingly irregular and dangerous, and would probably expose
parties to the unchecked severities of the enemy, yet they are not
s of piracy, unless committed in time of peace. . . . And,
is, non-commissioned vessels of a belligerent may capture hostile ships
hout being condemned as pirates. By the law of nations they are
ful combatants.

CROMPTON, J.—This was a merchant ship.

James.—No matter. It is clear international law that the sub-
ts of one belligerent may lawfully prey upon the commerce of
other.

COCKBURN, C.J.—It will not be denied by the other side that
his really were an act done on behalf of the Confederate States,
would not be piracy.

Lush.—I do not dispute that.

COCKBURN, C.J.—The difficulty is in knowing if this was really
h an act.

James.—But difficulty in the way of proof will not make the
rties doing a lawful act liable to the penalties of piracy. In the
verse case of a Confederate ship taken by Federals, should we
quire proof that it was an act of war? Should we say that the
w were pirates, unless they produced lawful evidence of their
hority? Again, *Wheaton* says :—

The President of the United States, while he in his proclamation of
ril 19, 1861, inaugurated a blockade of the so-called Confederate States
ed on belligerent rights, at the same time declared that any person
ing under letters of marque issued under their authority would be held
enable to the laws of the Union for the prevention and punishment of
acy. This Act of the American Government was thus noticed in a
bate in the House of Lords on the 16th of May, 1861. Lord
by said, "If there is one thing clearer than another, it is that
the law of nations privateering is not piracy ; that no enactment on
part of any one nation can make that piracy as regards the subjects of
other country which is not piracy by the law of nations or the law of that
untry. The Northern States, therefore, cannot be allowed to think that

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they are at liberty to strain the law so as to convert privateering into piracy, and visit it with death."

And again—

Privateersmen acting under commission from the President of the Confederate States were brought into New York and indicted for piracy. The case went to the jury on the Act of Congress, which was intended to apply to piracy, as a substitute for the definition of piracy by the law of nations. The statute, it was maintained, embraced cases of robbery committed on board an American vessel, though they might not come within the definition of piracy by the law of nations. The presiding judge admitted that if it were necessary on the part of the Government to bring the crime charged in the present case against the prisoners within the definition of robbery and piracy as known to the law of nations, there would be great difficulty in doing so upon the evidence, for that shews, if anything, an intent to depredate upon the vessels and property of one nation only, which falls far short of the spirit and intent that are said to constitute essential elements of the crime. But the robbery charged in this case is that which the Act of Congress prescribes as a crime, and may be denominated a statute offence, as contra-distinguished from that known to the law of nations.

Both the public and private vessels of every nation on the high seas, out of territorial limits of any other State, are subject to the jurisdiction of the State to which they belong, and Vattel says that the ships of a country are part of its territory.

Lush, Q.C., Milward, and Vernon Lushington for the United States Government.—The warrant is good. The statute does not require any "charge" to be made in America in the sense of a formal legal charge, but only in the sense of an accusation. A requisition by the American Minister was sufficient, and upon that the Secretary of State was bound to issue his warrant; and it was for the magistrate to see if the charge justified the delivering up. The earlier treaties between the two countries did not specify piracy. Why? Because either could punish it. But when another offence was created piracy, by the Legislature in the United States, the word "piracy" was introduced. Take a case of murder. Suppose a British subject to have committed murder in America on another British subject, could not his extradition be claimed?

COCKBURN, C.J.—Suppose that he had been tried here and acquitted, could the American Government claim his extradition to be tried again in America on the ground that they were not satisfied with the result?

Lush.—The American law, like our own, admits the principle that a man shall not be twice tried for the same offence.

CROMPTON, J.—Suppose he was about to be tried here, and America claimed him under the treaty, should we give him up?

Lush.—The offence was committed "within the territory of the United States," as it was done on board of one of their ships, and within their exclusive jurisdiction; for this purpose an American ship being American territory. "Jurisdiction" has a larger meaning than "territory."

COCKBURN, C.J.—Surely this case is "within our jurisdiction," for we could try it.

Lush.—In that sense it is so; but it is in a stronger sense within the jurisdiction of the United States, for it was committed within their *quasi* territory. According to the argument on the other side, the United States could not, under this treaty, claim extradition of an American subject for the murder of an American in this country. Piracy means, *primâ facie*, the crime of piracy recognised as such by the law of nations. But each nation by its own law made acts piracy which were not such by the law of nations, and both read the term in that sense. The term “piracy” in the treaty comprises all kinds of piracy common to the laws of both countries. In the French treaty, where the term “murder” was used in a particular sense, it was explained.

SHEE, J.—Because there is no term in the French language to express “murder” as defined by our law.

Lush.—So here if the term piracy had been explained; but not being explained, it must be held to include every kind of piracy.

COCKBURN, C.J.—Suppose something to be murder by the law of America, but not by our law—what then?

Lush.—In that case there should be no surrender. But it is not shewn in this case that the law differs. The question would have arisen in the case of the fugitive slave Anderson, on which *Wheaton* (p. 242), thus comments:—

The judicial power of every independent State extends, with the qualifications mentioned—1. To the punishment of all offences against the municipal laws of the State by whomsoever committed within the territory. 2. To the punishment of such offences, by whomsoever committed, on board its vessels on the high seas, and on board its foreign ships in foreign ports. 3. To the punishment of all such offences by its subjects, wheresoever committed. 4. To the punishment of piracy and other offences against the law of nations, by whomsoever and wheresoever committed.

It is evident that a State cannot punish an offence against its municipal laws, committed within the territory of another State, except by its own citizens; but it may arrest its own citizens in places not within the jurisdiction of any other nation, as the high seas.

James, Q.C., in reply.—There is no doubt that the laws of the two countries differ as to piracy, and if men were to be surrendered on pretence of piracy *jure gentium*, they might be tried and convicted in the United States for an offence not known to our laws. The purpose of the statute was to prevent escape from justice.

COCKBURN, C.J.—But might not that be effected by failure of evidence consequent upon the distance of the tribunal that tries from the place where the crime was committed?

James.—Yes. But it was not designed to protect against that form of defeat of justice, for as to that justice is everywhere and always exposed. The statute was directed solely against personal escape. He cited *Wheaton* (p. 247), referring directly to the crime of piracy.

The judicial power of every State extends to the punishment of certain offences against the law of nations, among which is piracy. Piracy is defined to be the offence of depredating on the seas without being

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authorized by any sovereign State, or without commissions from different Sovereigns at war with each other. The officers and crew of an armed vessel commissioned against one nation, and depredating upon another, are not liable to be treated as pirates in thus exceeding their authority.

The State by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under colour of its authority.

Unfortunately, in applying the term "piracy" in the codes of different countries, regard has not always been had to the fact whether the offence described is one against the law of nations, and consequently everywhere justiciable, or a crime for which the nomenclature has been arbitrarily adopted, and which is cognizable only before the municipal tribunals of the particular State.

The Court retired to consider their judgment. On their return—

COCKBURN, C.J.—The main and principal question for our determination is, what construction is to be put upon the 6 & 7 Vict. c. 76, which gives effect to the treaty between Her Majesty and the United States of America for the apprehension of certain offenders? Besides that, two or three minor points have been made with reference to the regularity of the proceedings by virtue of which the prisoners on whose behalf this application is made have been taken into custody and remanded from time to time. It has been objected that, prior to the issuing of the warrant by the Secretary of State, there should have been depositions taken and a warrant issued in the United States, and that that should have been the foundation of the requisition to the Government of this country to issue a warrant for the prisoners' apprehension. I think that point is untenable. The second section of the Act does not require the issuing of any warrant or the taking of depositions in the United States. The whole effect of the proviso is, that before a Secretary of State issues a warrant for the apprehension of any person under the Act, there must be evidence before him which would justify the apprehension and committal of such person in the United States, and the second section only provides that such evidence may be made up of copies of the depositions upon which the original warrant (if any had been granted) was issued in the United States. Another objection made was, that the magistrate's warrant was imperfect in not stating that the evidence on which it proceeded was taken upon oath to support the charge for which it was issued. Mr. Lush met that objection successfully by pointing out a form given in a subsequent statute which had been followed in the present instance. Then we come to the great question in the case, What is the true construction of the statute? Now the words are undoubtedly large enough in their primary and ordinary sense to comprehend this case. Provision is made for the delivery up to the authorities of the United States of persons who have been guilty of piracy "committed within the jurisdiction of the United States of America." Passing for a

moment from the question whether there was evidence of the crime of piracy committed there, there can be no doubt that, if in this case it is an offence at all, it is piracy *jure gentium*; and the statute provides for cases of piracy "committed within the jurisdiction of the United States of America." Nor can there be any doubt that, if it was piracy, it was committed on board an American ship, and so in that sense within the jurisdiction of the United States. Then comes the question whether that is sufficient within the meaning of the statute. The main argument for the prisoners is, that the statute is to be read as applicable only to a case where the act of piracy which has been committed is within the exclusive jurisdiction of the United States. If the term piracy in the statute is to be read as piracy *jure gentium*, then it appears the case for the prisoners is at once disposed of. If the contracting parties intended that such piracy should be deemed within the treaty, then, inasmuch as piracy is an offence not against any particular statute, but against the whole civilised world and punished by all civilised nations, then the offence here would not be one committed within the exclusive jurisdiction of the United States, so that if the word piracy is used in the statute in the largest sense, the case for the prisoners falls to the ground. Now what is there to show that the term piracy is used in a limited sense? If it is to be restricted to piracy by the municipal law as a matter for the exclusive jurisdiction of the particular country where the offence is committed, then no doubt the statute may be construed in the way contended for the prisoners, as being restricted to certain offences committed within the exclusive jurisdiction of the country claiming the extradition of the accused. If such had been the intention, it strikes me we should have had piracy by the municipal law in some way distinguished from piracy as understood in the more general acceptance of the term, but the language is the widest and most comprehensive. Why, then, is it to be implied in a limited sense? It is said, and with truth, that the mischief the Extradition Treaty was intended to prevent was that of persons committing crimes within the territory of one State and within its jurisdiction, escaping out of that jurisdiction with impunity, and that for such purpose only was this statute passed. That this was the primary object I entertain no doubt, but that it was the only one I entertain great doubt, because it is impossible not to see that the mischief is not limited to such cases. It may be that an offence may be cognisable in two countries, as in the case of a murder committed by one British subject upon another in the United States, in which case the accused may be tried in this country by the municipal law, yet it would be highly inconvenient that he should be tried here, because criminals, as I observed during the argument, may escape not only by going beyond the territory and reach of the law of the country in which the crimes have been committed, but also by failure of evidence and the difficulty of adducing sufficient evidence except in the country where the crimes have been committed. Therefore, if the

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language of the statute is large enough to comprehend both these kinds of mischief, it is highly inexpedient to restrict it to one only. It has been urged, indeed, with great force, that it is inconsistent with the dignity of this country to surrender the jurisdiction of its own tribunals in a case of concurrent jurisdiction, and allow persons who could be tried here to be carried away to be tried elsewhere. But it seems to me, that the moment you say you will give up offenders with a view to promote the large interests of justice throughout the whole civilised world, as a matter in which all nations have a common interest, you must then look to see what is the extent and scope of the mischief you thus desire to counteract and to prevent; and I cannot see that there is any abandonment of national dignity or honour in saying that, though there may be concurrent jurisdiction in respect of offences which have been committed by our own subjects in foreign countries, yet if the foreign States against whose laws the crimes have been committed require that the criminals should be surrendered to justice, and justice can be better done in the country in which the offence is committed, I cannot see that there is any violation of national dignity or character in doing that which is expedient and desirable to promote the interests of justice. And, looking to the ground of convenience, I think that, if the treaty and the Act were not capable of the construction I put upon them, the feeling of the country would probably be to amend them. And, as the words are strong enough to include the case of piracy *jure gentium*, and I see no reason for a more limited construction, I think that, if there was a *prima facie* case of such piracy before the magistrate, the case comes within the Act. It is impossible, in my opinion, to limit the word "jurisdiction" by the insertion of the word "exclusive," and on that point I am inclined to adopt the view taken by Mr. Lush, that the true meaning of the word is the area over which, whether it be land or sea, the laws of the particular State prevail; and, inasmuch as it is conceded that the ship of a certain territory is, constructively, part of its territory, or, at all events, a place where its laws prevail, this ship was within the jurisdiction of the United States. I feel, therefore, bound (though I regret to differ from my learned brethren), in adherence to the view which I take of the statute, to hold that this case comes within it, and therefore that the prisoners are not entitled to be discharged. As to the other question, whether, supposing piracy *jure gentium* to be within the Act, there was sufficient *prima facie* evidence of it, I agree in everything Mr. James said as to acts done with the intention of acting on the behalf of one of the belligerent parties; and I concur in thinking that persons so acting, though not subjects of a belligerent State, and though they may be violating the laws of their own country, and may even be subject to be dealt with by the State against whom they thus act with a rigour which happily is unknown among civilised nations in modern warfare, yet if the acts were not done with a piratical intent, but with an honest intention to assist one of the belli-

erents, such persons cannot be treated as pirates. But then it is not because they assume the character of belligerents that they are thereby protect themselves from the consequences of acts really piratical. Now, here it is true that the prisoners at the time said they were acting on behalf of the Confederates, and that was equivalent to hoisting the Confederate flag. But then pirates sometimes hoist the flag of a nation in order to conceal their real character. No doubt, *prima facie* the act of seizing a vessel, saying at the same time that it is seized for the Confederates, may raise a presumption of such an intention; but then all the circumstances must be looked at to see if the act was really done piratically, which would be for the jury, and I cannot say that the magistrate was not justified in committing the prisoners for trial. It is, however, unnecessary to say more upon this point, as, upon the main question, my learned brethren (for whose opinions I have the utmost deference, and who, I have no doubt, are right) are of opinion in favour of the prisoners, and therefore they will be discharged.

CROMPTON, J.—I desire to speak with great deference, as I did not hear the argument when the rule for the *habeas corpus* was argued. This is a motion on the return to the *habeas corpus* to discharge the prisoners on the ground that the custody is illegal. I agree with Cockburn, C.J., that it is not necessary that there should be any foreign proceedings before proceeding in this country under the statute. All we have to consider is, whether there was any evidence on which the magistrate could reasonably, in the exercise of his discretion, commit these prisoner to gaol for the purpose of being delivered up to the United States authorities. It is not a convenient practice for this Court to interpose before the magistrate has decided, but in the present case he has asked for assistance. In determining this case, we must see if there could be anything illegal in the magistrate's committing these prisoners to gaol under the Act. We are not the proper parties to judge of the evidence, but we have the power of saying that there is no evidence before him on which he ought legally to come to the conclusion to commit them to gaol. I cannot say that the magistrate ought not to commit them, on the ground that the act done was something like a belligerent act; for, looking at the irreputitious way in which the prisoners went on board and took the vessel, there was evidence that this was piracy. Upon this point I quite concur with my Lord, because it is not for us to weigh the effect of the evidence, which is for the magistrate, and all we can consider, is whether there is enough to justify a committal; and I agree with my Lord that we cannot say that there is not. But upon the other and the main question I have come, after careful consideration of the case, to a different conclusion. The preamble of a statute is a good key to its meaning, and here the preamble of the statute points clearly to offences committed within the jurisdiction of either of the contracting States—that is, within the jurisdiction of one of them, and not of the other.

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It goes on to speak of persons who, having committed certain crimes within the jurisdiction of one of the two countries (that is, as I read it, of one of them and not of the other), shall "seek an asylum" and be found in the territory of the other. Now, an "asylum" surely means a place where the criminal is safe from prosecution or pursuit, not a place where he may be tried and convicted. The enactments of the statute apply to cases in which persons having committed murder or piracy or robbery within the jurisdiction of the United States, afterwards seek an asylum or are found in British territory; and it appears to me that they mean only cases of crimes committed within the peculiar jurisdiction of the United States. And that phrase, of course, could not be applied where the crime is equally within the jurisdiction of every nation in the world, as is piracy *jure gentium*. It would not be a proper use of words to say that such a crime was committed within the jurisdiction of the United States. The words, "within the jurisdiction of either of the contracting States," mean within the jurisdiction of either of them respectively or relatively to each other—i. e., of one of them and not of the other. But here the crime was within the jurisdiction, not only of both of them, but of every nation in the world. Then the persons charged are to be "delivered up to justice"—that is, to the justice of the country where justice can be done, implying that they are in a country where it cannot be done. Otherwise, when the men were actually committed for trial in this country, they might be claimed, to be tried abroad, which surely would be a strange construction of the Act. Indeed, according to that construction, one does not see why they might not be claimed back again by this country. For this is clearly, if anything, a case of piracy *jure gentium*, and triable in either country. The fact that the men, being in the ship, seized it, makes no difference; it is equally piracy unless it was an act of belligerency; but, if such, more so on that account than if the men had been in another ship. No doubt, in either case, it would be within the jurisdiction of the United States, but that would be a jurisdiction shared equally with the whole world. Is that a case within the meaning of the Act? Surely it would be a strange construction of its terms, and it must mean peculiar and exclusive jurisdiction. The case here was near American waters, but would be the same in principle if it had occurred in the Chinese seas. Whether the Act would apply in all cases, even of piracy by American subjects in distant seas, it is not necessary to determine. It is not to be lost sight of that the statute, in my view of it, carries out what was deemed by some writers to be the obligation of international law before it passed—viz., to deliver up criminals who could not be tried here. My view of the Act is also confirmed by some high American authorities who have been referred to. [He here referred to the following extracts from a speech of the Hon. J. Marshall, delivered in the House of Representatives of the United States, in *Nash's* case (5 Wheaton's Reports, appendix):—"The well-considered opinion of the Ameri-

can Government is, that the jurisdiction of a nation at sea is personal, reaching its 'own citizens only,' and that this is the appropriate part of each nation on that element." "A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility is an act of piracy. Not only an actual robbery, therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation, and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation is only punishable by that nation. A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations, which only is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable." So the able judgment of Mr. Justice Nelson in the case of *Re Kain* (14 Howard's American Reports, 137): "The two nations agree that upon mutual requisition by them, or their officers or authorities respectively made, *i. e.*, on a requisition made by either one Government, or by its ministers or officers properly authorised, upon the other, the Government upon whom the demand is thus made shall deliver up to justice all persons charged with the crimes as provided in the treaty, who shall have sought an asylum within her territories. In other words, on a demand made by the authority of Great Britain upon this Government, it shall deliver up the fugitive; and so in respect to a demand by the authorities of this Government upon her. This is the exact stipulation entered into when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern—the punishment of criminal offenders against their laws—and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated." Taney, C.J., and the other judges referred to this judgment as containing an exposition of the law on which they based their own judgments, and the result is, that in their opinion the statute only applies in cases where the fugitives could only be tried in the territory to which it was proposed to deliver them up. It is difficult to see that two great maritime nations would have given up their jurisdiction to try pirates whenever they were caught. Take the case of a pirate taking an American, an English, and a French vessel, on the same day, in some of those distant seas where pirates abound. Why should not the courts of either of the three countries in which the pirates might be found do justice upon them? It is said that we must trust to the discretion of the other State that it will not demand extradition in cases where it is unreasonable to do so. But that is a very dangerous doctrine, to which I cannot subscribe; and I think it is far more wise to construe the Act in such a way, if we can, as to exclude cases in which the demand would be unreasonable. At first sight

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it certainly occurred to me that the word "piracy," in its primary sense, was against my reading of the statute; but that was answered by Mr. James in his able argument, for he stated that there were some species of piracy by the municipal law of America not piracy by our law. It was said by Mr. Lushington that the jurisdiction would depend upon whether the ship was the ship of one nation or of another, but that can hardly be so. It is an offence against all nations. The pirates are not English pirates or American pirates, but pirates against all nations. The principal argument in support of the committal was founded upon the fact that the ship was American, and it was argued that therefore the case was, in some peculiar way, within American jurisdiction. But I doubt that. The piracy—if piracy—was not altered in character because committed in the ship itself which was seized. Suppose the prisoners had been in a ship of their own, and sunk the other, without ever going into it? It would be the same offence, and equally, in both cases, it would be within the common jurisdiction of the courts of all nations. And it does not appear to me, therefore, that it could be said to be within the jurisdiction of the United States more than of any other country. Nor can I see that in this statute the two States have given up their jurisdiction to try pirates whenever they can take them. I think, upon the whole, that the case is not within the statute, which I read as being limited to piracy committed within the peculiar jurisdiction of the United States. If, therefore, this was a belligerent act, the prisoners are entitled to our judgment; but if not—and I think it was not, but a charge of piracy *contra jus gentium*—in my view, the case is not within the statute. The prisoners are therefore entitled to be discharged.

BLACKBURN, J.—I agree with my brother Crompton in thinking that the prisoners ought to be discharged. They have been committed to gaol on a warrant under the Extradition Act, and the question is, what is the state of things required to authorise their being committed to gaol for the purpose of being delivered up to the United States authorities? There would be no right so to commit but for the 6 & 7 Vict. c. 76. That Act was passed for carrying out a treaty between this country and the United States, for the apprehension of certain offenders, and the Act recites part of the treaty, and the words of the statute are to be construed as if it had been a contract between two subjects. Looking at the words alone, I think it would apply to crimes committed within the jurisdiction of one of the contracting countries only, and not to crimes within the jurisdiction of both. I think this is clear, whether we look to the terms of the Act, or to its obvious object. The main argument in favour of the opposite view is founded upon the force of the word "piracy," which, it is urged, in its primary sense, means piracy *jure gentium*, and so must apply to cases within the jurisdiction of both countries, and no doubt it would include such piracy if it stood alone; but then there are the words "committed within the jurisdiction of the United

States," which run through the Act and are its governing words. The question is not one of territorial jurisdiction, but of piracy, which is quite different. There are a great many offences called piracy which are not piracy by the law of nations. Offences of piracy in which there is a common jurisdiction do not seem to me to satisfy the words of the statute. In *Kent's Commentaries* (186) I find it written: "It is of no importance, for the purpose of giving jurisdiction, on whom or where the piratical offence has been committed. A pirate who is one by the law of nations may be tried and punished in any country where he may be found, for he is reputed to be out of the protection of all laws and privileges. The statute of any Government may declare an offence committed on board its own vessels to be piracy, and such an offence may be punishable exclusively by the nation which passes the statute. But piracy, under the law of nations, is an offence against all nations, and punishable by all." Such is the law as laid down by that great American authority, and it is also perfectly good English law, and both countries must be supposed to have entered into the treaty with a full knowledge of it. Why, then, should piracy by the law of nations be deemed within the jurisdiction peculiarly of one of the two States? It would be so if it were piracy only by its own municipal law. The American citizen, who has done an act declared to be piracy by American statutes, would be within American jurisdiction, and the English subject who has done an act which was declared piracy by an English statute would be within English jurisdiction; and such piracy, no doubt, would be within the treaty, and America would give up an English subject who had committed piracy by English law, and England would give up American subjects who had committed piracy by American law. But the man who has committed piracy *jure gentium* is equally within the jurisdiction of either country, and peculiarly in the jurisdiction of neither, and so is not within the meaning or the mischief of the statute. I therefore think that in a case of municipal piracy the accused ought to be delivered up under the Act, but the case of piracy *jure gentium* is not within the words or mischief of the Act, as I think. It is true there may be cases in which it may be more convenient that the prisoners should be tried in one country than in another, but this is a question not of convenience, but of jurisdiction. No power is given to us by any other Act to send accused persons to another country for trial where a trial can be more conveniently had. The question then comes round to this, whether this was piracy *jure gentium* or not? It strikes me that there was such an amount of evidence of its being piracy *jure gentium* as, if the case had been before a jury, the judge would not have been justified in withdrawing it from them. I do not wish to prejudice the case, and all I say is, that there is, upon the depositions, a case of that sort. As to the evidence, its effect would be for the jury, and though the Confederate States are not recognised as independent, they are recognised as a belligerent power, and there can be no doubt that parties really acting

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on their behalf would be justified. But the case is either one of piracy by the law of nations—in which case the men cannot be given up, because they can be tried here—or it is a case of an act of warfare, in which case they cannot be tried at all; and as they are now detained for the purpose of their being delivered up to the American Government, they are entitled to be discharged.

SHEE, J.—I have had the advantage in this case of hearing two arguments, one on the motion for the rule, and another on the motion for the discharge of the prisoners, and I have referred to and considered the cases which have been cited. The crime with which the prisoners are charged as described in the return, and as appears on the depositions, is piracy on the high seas, a crime of pre-eminent enormity, and which, by the law of nations, is justiciable wherever the offender may be found. It is not, in my opinion, the crime for which, under the name of piracy, extradition is stipulated, in the treaty of the 9th August, 1842; the provisions of that treaty were not needed for, nor are they, as it appears to me, applicable to, its repression. The treaty provides that persons charged with having committed the crimes of murder, piracy (not piracy on the high seas), arson, robbery, or forgery, within the jurisdiction of the United States, and seeking an asylum in or found in the territories of our Sovereign, shall, on the requisition of the United States, be delivered up to justice. The object of the 10th article of the treaty, as appears from its provisions and from the title and enacting clauses of the 6 and 7 Vict. c. 76, which gave effect to it, was to legalise the apprehension within the territories of the Queen of persons charged with the commission of the crimes mentioned in the treaty within the jurisdiction of the United States for the purpose of their surrender to that jurisdiction. The persons whose apprehension and extradition are contracted for by the treaty and authorised by the Act of Parliament are persons “fugitive” from the justice of the United States, and “seeking an asylum” that is (but for the treaty and the Act of Parliament) safe in the asylum of the territories of our Queen, because not liable to be arraigned before her tribunals. The words “surrender,” “deliver up to justice,” mean deliver from an asylum or place of safety up to justice, that is to the ministers of justice of the United States, by whose courts, only, on the persons charged with the crimes imputed, justice can be done. Read with reference to the declared object of the treaty and the Act of Parliament, and by the light in which the words “fugitive,” “seeking an asylum,” “surrender,” “deliver up to justice,” afford, the words “within the jurisdiction” must, as I think, mean within the exclusive jurisdiction of the United States, and cannot be held to extend to crimes not within any jurisdiction exclusively—but justiciable wherever the person charged with having committed them may be found. It is injurious to suppose that a State should, in a public treaty, admit the possibility of its unwillingness or inability to do justice by binding itself to surrender to the justice of another State persons charged with the commission of crimes

which it would be the duty of both to punish, and over which both would have jurisdiction. Had this been intended, provision would surely have been made for the case of justice by acquittal or conviction having been done by one State before cognizance of the crime taken by the other—for pleas of *autrefois convict*, or *autrefois acquit*—familiar in this case to the jurisprudence of both States, and for proof by the record of conviction or acquittal—that the crime for which the offender had been in jeopardy was the crime for which extradition was claimed. But the treaty and the Act of Parliament contain no such provisions, though stipulations for the extradition of criminals had been long in force between the two Governments, and the meaning of the words “within the jurisdiction” had been the subject of serious discussion between them. Upon the words, therefore, of the treaty and the Act of Parliament alone, I should have been prepared to hold that the words “within the jurisdiction” mean within the exclusive jurisdiction of the State requiring the extradition. We have been invited, however, to consider—and I think we must consider—the state of the law in the United States as respects piratical offences before the date of the treaty, in order the more satisfactorily to determine to what extent the provisions of the treaty would take effect if the word “exclusive” were added to the words “within the jurisdiction,” that is, first, within the exclusive jurisdiction of the United States as respects the place where the offence was committed; secondly, within the exclusive jurisdiction of the United States as respects the person by whom the offence was committed. It will be seen, I think, on reference to the legislation of the United States before and at the time the treaty was signed, that consistently with that legislation, the words “within the jurisdiction” in both of these meanings may have, as respects offences of a piratical character, a very extensive range, without including the crime of piracy on the high seas. The Constitution of the United States gave power to the Congress to define among other crimes the crime of piracy. It was inherent in the sovereignty of the United States, as respects the subjects of the United States, to designate as piracy, and punish as piracy, crimes committed within its jurisdiction which were not piracy on the high seas, not piracy by the law of nations. The Act of Congress of the 30th April 1790 provides “that if any person shall commit upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State, murder or robbery, or any other offence which if committed within the body of a country would by the laws of the United States be punishable with death, or if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship voluntarily to any pirate; or if any seaman shall lay violent hands on his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken and adjudged

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to be a pirate and a felon, and being thereof convicted shall suffer death. And that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof upon the high seas, under colour of any commission from any foreign prince or State or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death." These provisions, most of which are with little more than verbal alteration taken from our own statute-book, include as respects citizens of the United States, and persons owing temporary allegiance to them in return for the protection of themselves, not only piracy by the law of nations, but, as respects citizens, offences also which are piracy because the municipal law-givers have chosen so to call them. By an Act of Congress of March 3, 1819, c. 75, s. 5, it was enacted that, if any person on the high seas should commit the crime of piracy as defined by the law of nations, he should on conviction thereof suffer death. By an Act of Congress of the 5th of May, 1820, it was enacted, "that any person who should upon the high seas or in any open roadstead (which has been held in the Supreme Court of the United States to be upon the high seas), or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate, and being convicted thereof shall suffer death. And if any person engaged in a piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit such robbery, such person shall be adjudged a pirate, and on conviction thereof shall suffer death." It thus appears that the Legislature of the United States, in framing municipal laws for repression of offences of a piratical character, has always kept in view and made special mention of "piracy on the high seas," grouping with it, however, a large class of offences which bear a strong family resemblance to it, committed within the territorial jurisdiction of the United States, but which are not piracy by the law of nations—viz., "robbery in any river, haven, basin, or bay out of the jurisdiction of any particular State of the United States, upon any vessel or upon the lading or ship's company of any vessel in any open roadstead, haven, basin, or bay, or in any river where the sea ebbs and flows." On land, if the robbery be committed by persons engaged in a piratical cruise or enterprise, or being of the ship's crew or ship's company of any piratical ship or vessel, who shall land from such ship or vessel, and on shore commit such robbery. Many of the crimes thus defined, though included in a list at the head of which is "piracy on the high seas," and classed with it as equal in guilt and deserving of equal punishment, differ from it in the essential particular that they are not committed on the high seas, but within the territorial jurisdiction of the United

States; and being committed within the territorial or personal jurisdiction of the United States, they are thus offences, not against our laws (though we have laws to the same effect), but against the laws of the United States. Regard being had to this legislation, which must have been in full view of the American Minister who negotiated this treaty, it is a remarkable feature of the treaty, tending strongly to show that "within the jurisdiction" means within the exclusive jurisdiction, territorial or personal, of the United States, that, though "piracy" committed within the jurisdiction of the United States, and (as if to avoid all cavil as to its meaning) "robbery" are mentioned, piracy on the high seas—piracy by the law of nations—has been omitted. For these reasons I am of opinion that the true reading of the words "within the jurisdiction," is within the exclusive jurisdiction of the State requiring extradition. And as to the second point, I agree with my Lord, that the facts tend rather to show that the prisoners acted *animo jurando*, than *animo belligerandi*, and that would be sufficient, if the meaning of the treaty were against them, to justify their committal. And on the points of form I agree with the rest of the Court.

COCKBURN, C.J.—I wish to add that one of the grounds of the conclusion to which I came was, that if we are to construe the statute as applying only to cases of exclusive jurisdiction, this consequence would follow—that whenever an English subject has committed in America a crime for which he could be tried there, although he could also be tried here, he could not be given up. I do not think the Legislature could have contemplated a result so mischievous. However, as the majority of the Court are of an opposite opinion, the prisoners must be discharged.

Rule absolute.

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COURT OF QUEEN'S BENCH.

May 9, 1864.

EX PARTE PATER. (a)

(Before COCKBURN, C.J., BLACKBURN, MELLOR, and SHEE, JJ.)

*Quarter Sessions—Jurisdiction—Contempt of court—Licence of counsel.**A Court of Quarter Sessions has power to fine a barrister for contempt of Court, even though committed by him in what he believes to be the legitimate exercise of his professional duty.**But if the Court of Quarter Session fines for contempt of Court without any reasonable ground, this Court will interfere.**Counsel has a right to, and may with propriety complain of the appearance of partiality on the part of any of the jurymen, but to do so in violent and abusive language, or in a violent manner and for the purpose of insult, and in spite of admonition from the Court, is a contempt.*

RULE nisi calling upon Justices for the county of Middlesex, to shew cause why a *certiorari* should not issue to remove into this Court all orders made by them at the General Sessions holden for the said county at the Clerkenwell Sessions House, on the 22nd of March, 1864, concerning Thomas Kennedy Pater.

The affidavit of Thomas Kennedy Pater in support of the rule stated:—

1. That he was engaged as counsel to defend Robert Griffiths on an indictment for larceny on the 22nd of March last, at the Adjourned General Sessions holden in and for the county of Middlesex, at Clerkenwell, in the Second Court, before Joseph Payne, Esq., acting as Deputy Assistant-Judge of the said Court.

2. That in the course of the trial he urged to the Court an objection against the course adopted by the prosecuting counsel, when he was interrupted by the foreman of the jury, who said, "We know what all this is for, we know the object of such interruptions;" and that on another occasion during the trial in the discharge of his duty he objected to the prosecuting counsel examining his own

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

witness, as if in cross-examination, and contended that as the witness had not shown himself to be hostile, it was not open to the learned counsel to cross-examine his own witness as if he were hostile; and added that to do so was very objectionable, as very little pressure only was sometimes necessary to induce a person to state that which was not the truth; and that immediately after he had made this objection he was again interfered with by the said foreman, who said that "counsel had no right to insinuate that the witness was not speaking the truth." To which he replied that it would be as well for him "not to get into collision with him" (Mr. Pater).

3. That these interferences were entirely unchecked by the Court, and were in tone and character such to lead him (Mr. Pater) to believe that the foreman had prejudged the case, and in consequence of that belief he, in his address to the jury, made the following observation: "I thank God that there is more than one jurymen to determine whether the prisoner stole the property with which he is charged; for if there were only one, and that one the foreman, from what has transpired to-day there is no doubt what the result would be."

4. That the said Deputy Assistant-Judge immediately said that that was a very improper observation to make, and insisted upon its withdrawal, and upon his (Mr. Pater's) declining to do so, he said he should take down the observation, and consult the Assistant-Judge, W. H. Bodkin, Esq., who was sitting as judge in the other court, as to what should be done, and went to the other court for that purpose, and on his return said he had consulted the Assistant-Judge in reference to this matter, but it was his opinion that at that stage it would not be fair to interfere, as it might prejudice the case against the prisoner at the bar, but when it was concluded, they should then consider what course should be taken as regarded himself. The said W. H. Bodkin, Esq., sat and acted as Assistant-Judge of the said sessions in the first court during the said sessions, and during the day when the said fine was imposed.

5. That he then resumed his address to the jury, and at the conclusion of the trial, and after the prisoner was convicted and sentenced, the said Assistant-Judge came into the court presided over by the said Joseph Payne, Esq., and recommended him to treat the observation set out above as a contempt of Court, and to inflict upon him a fine of £20; and he was, a short time afterwards, fined £20 by the said J. Payne, Esq.

6. That before the fine was inflicted he wished to address the Court, but the said J. Payne, Esq., declined to hear him, and the fine was imposed without an opportunity having been given to him to show cause why the fine should not be inflicted.

7. That in making the observations set forth in paragraphs 2 and 3, he said that he (Mr. Pater) acted *bonâ fide*, and according to the best of his judgment in discharge of the duty which he owed to his client, and that he had no thought of offering any contempt to the Court.

The affidavit of Joseph Payne, Esq., the Deputy Assistant-Judge, stated (among other things):—

2. In the course of the trial referred to in the said affidavit, the said T. K. Pater irregularly told the witness for the prosecution who was under examination, that he was not speaking the truth; the foreman of the jury thereupon said that he thought the counsel had no right to tell the witness that he was swearing falsely. Whereupon the said T. K.

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Pater immediately, in a loud, offensive, and insulting tone of manner said to the foreman, "You had not better not get into collision with me, Sir," to which the said foreman made no reply, and the case for the prosecution proceeded to its close.

3. When the said T. K. Pater rose to address the jury on the part of the prisoner, he was in a state of great excitement, and he began his address in the following words: "I thank God there is more than one jurymen to determine whether the prisoner stole these articles, for if there was only one and that one the foreman, from what has transpired to-day, there is no doubt what the result would be." The said T. K. Pater also told the said foreman that he ought to be removed from the box and another put in his place. The above words were uttered by the said T. K. Pater in a loud, threatening, insulting tone and manner, and accompanied with violent gestures; and the conduct of the said T. K. Pater on the said occasion appeared to me to be calculated to provoke retaliation on the part of the jury, and probably to lead to a breach of the peace.

4. I thereupon stated to the said T. K. Pater that I thought this was hardly the way to treat a gentleman who was discharging upon oath an important and compulsory duty in a court of justice, and requested him the said T. K. Pater to withdraw the expressions he had used, as they might be taken to insinuate that the said foreman of the jury would find the prisoner guilty on account of the previous collision with his counsel, to which the said T. K. Pater answered that he would repeat the words again; which he did, in the same loud, offensive and insulting manner as before, and also added that if I wished them to be taken down, he would repeat them again, and would repeat them to the end of time.

5. I thereupon wrote down the words before mentioned, and went into the adjoining court to consult the Assistant-Judge, and by his advice I allowed the case to proceed to the end without further notice, in the meantime, of the conduct and language of the said T. K. Pater.

6. After the case was over, I requested the attendance of the Assistant-Judge in my Court, and the said T. K. Pater was thereupon requested by the said Assistant-Judge to withdraw the expressions he had so used as aforesaid, the said Assistant-Judge saying to him, "Mr Pater, now the case is over, surely you must see the impropriety of such remarks as you made." But the said T. K. Pater in the presence of the said Assistant-Judge, of myself, and several other magistrates, again refused to withdraw or in any way qualify the expressions which he had used, or to make any apology for the same, or for the manner in which he had conducted himself. Whereupon the said T. K. Pater was adjudged to have committed a contempt of the said Court, and for such contempt was fined the sum of £20.

7. On the said fine being imposed, the said T. K. Pater said, addressing me, "This shall not rest here. I shall bring the subject under the notice of Sir George Grey, and very probably your removal from the Bench will be the result."

8. I say that the conduct, manner, and gestures of the said T. K. Pater during the proceedings herein set forth were violent, offensive and contemptuous, and were, in my judgment, calculated to disturb and obstruct the due and proper administration of justice.

9. I say that on a trial before me at a former Sessions of the peace for the county of Middlesex held a few weeks before, as I finished my summing-up, the foreman of the jury pronounced a verdict of guilty,

without at that moment consulting his brother jurors, whereupon the said T. K. Pater said to the said foreman in a rude manner, "You have not done your duty." To this the said foreman replied that they had before agreed upon their verdict, but did not think it right to interrupt the summing-up of the judge, upon which the said T. K. Pater said to the foreman, "You are a wicked old man, and are quite old enough to know your duty better." The whole of the jury having expressed themselves strongly in reprobation of the conduct of the said T. K. Pater, I forbore on that occasion to inflict any fine upon him, hoping that such reprobation would be a sufficient warning to the said T. K. Pater for his future conduct.

10. I deny that before the said fine was inflicted I declined to hear the said T. K. Pater, and that the said fine was imposed without an opportunity being given to the said T. K. Pater to shew cause why it should not be inflicted.

Bovill, Q.C. and Welsby now shewed cause, and having read the affidavit of Mr. Payne, said that the question was of great importance to the independence of the Bar, but still more so to the administration of justice. Happily in the Superior Courts such occurrences never arose. One of the earliest and most deeply implanted sentiments in the English mind and character was one of deep respect for the sanctity of courts of justice; and certainly in the Superior Courts such scenes never took place, and it was very seldom that there was any occasion for the interposition of the judges, and whenever such occasions did arise, the least intimation from the Bench was sufficient, and was sure to be at once acquiesced in. It was due to Mr. Pater to notice that in his affidavit he denied any intention to offer any contempt to the Court; but when called upon at the time to explain or apologise, he refused to do so.

COCKBURN, C.J.—There could be no doubt that counsel had a right to appeal to the jury not to be unduly influenced by the opinion of any of their number, and if any of them had expressed themselves strongly against his client he had a perfect right to appeal to the rest. It not unfrequently happened that when a judge intimated his opinion to be adverse to one of the parties, the counsel appealed to the jury against that opinion, and reminded them that they were the judges of matters of fact; and so long as this was said in a becoming manner, no judge would take exception to it. But it is otherwise when the mode of making the observation was offensive, and if ambiguous, and admitting of an offensive interpretation, it ought to be explained; and, in this instance, the other observation about removing the foreman from the jury box might serve to illustrate the spirit in which the words were spoken for which the fine was inflicted.

Bovill.—A great deal must, of course, depend on tone and manner, as to which only those who were present could judge; and it was for the Court, who adjudged the contempt, alone to determine whether what was said amounted to contempt. For this he cited *Reg. v. Davison* (4 B. & Ald. 329) where the Lord Chief

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Justice had fined a party defending himself on a charge of libel for observations deemed offensive and amounting to a contempt. It was true that was the case of a Superior Court; but in this respect the Court of Quarter Sessions was in the same position, that it could fine for a contempt of Court; and what was a contempt it was for that Court itself to determine, subject, no doubt, in some degree, to the supervision of this Court to see if there were any grounds for it, but not by way of appeal. It must be admitted that Mr. Pater was fined for no other words than these: "I thank God there are twelve jurymen, for if it rested only with the foreman there would be no doubt of the result." But then the meaning of the words it was for the Court to decide. Important as were the privileges of the Bar, the administration of justice and the protection of those engaged in it were still more important. Barristers had often been termed by great judges "ministers of justice," and they owed a duty, not merely to their clients, but to the Court, and this doctrine had been acted upon in many ways. And if a barrister unfortunately so forgot himself as to use words in a tone and manner which produced on the mind of the presiding judge the impression that a contempt of Court had been committed, it was within the province of the Court (if a court of record) to fine him for that contempt, after due opportunity afforded him for explanation or apology: (*Ex parte Fernandez*, 10 C. B., N.S., 3; *Sheriff of Middlesex's case*, 11 A. & E. 273).

Denman, M' Mahon and *Kenealy*, in support of the rule.—It was very important to bear in mind that the first occasion of offence had not been given by Mr. Pater—no, nor even the second; for first, the jury had most improperly interrupted him, and then the judge had altogether omitted to check or control them.

MELLOR, J.—Certainly the observations of the juror were most improper and impertinent.

Denman.—The jury had no business to interfere with counsel. That was the province of the presiding judge.

COCKBURN, C.J.—Sometimes the observations of jurors are useful, but then they ought to be addressed to the judge.

Denman.—Just so; and surely, after the judge had countenanced in this case this most improper interference of a juror, it was most unjustifiable to fine counsel merely for remonstrating against it.

COCKBURN, C.J.—Much may depend upon tone and manner.

Denman.—But no tone or manner can extend or enlarge the import of words beyond the sense and meaning of which they are naturally capable.

COCKBURN, C.J.—The Court was bound to protect the jury.

Denman.—Most certainly, but not from what is admitted to be a just remonstrance; for if the interruptions of the jurors were improper, and the judge did not check them, counsel had a right to remonstrate. The arbitrary judges who, in the times of the Stuarts, fined jurors or witnesses, tried to eke out the alleged offences by such epithets as "loud," "offensive," or "insulting." But they were vague and unmeaning phrases. "Loud!" Why,

judges sometimes were so. "Offensive!" Why, most people found remonstrances offensive when they were in fault. "Insulting!" That was to be judged of by the words used. And the words used here had no such meaning, and were not reasonably or fairly capable of it. To allow a barrister to be fined for contempt for words admitted to be in themselves unexceptionable, merely because the judge chose to fancy them uttered with an offensive meaning, would be a most dangerous precedent. Why our ablest and most illustrious advocates would have been liable to be fined either in our own times or times gone by, over and over again for similar cause. Had their lordships forgotten the instance, cited by Lord Campbell, from the celebrated case of *The Dean of St. Asaph*, in which Mr. Erskine was counsel? The jury had returned a verdict, "Guilty of publishing only," upon which Buller, J. said:

You say he is guilty of publishing the pamphlet, and that the meaning of the inuendoes is as stated in the indictment?

Juror.—Certainly.

Erskine.—Is the word "only" to stand part of the verdict?

Juror.—Certainly.

Erskine.—Then I insist it shall be recorded.

BULLER, J.—Then the verdict must be misunderstood. Let me understand the jury.

Erskine.—The jury do understand their verdict.

BULLER, J.—Sir, I will not be interrupted.

Erskine.—I stand here as an advocate for a brother citizen, and I desire that the word "only" may be recorded.

BULLER, J.—Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner.

Erskine.—Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.

Commenting upon this, Lord Campbell proceeds to observe:

The learned judge took no notice of this reply, and, quailing under the rebuke of his pupil, did not repeat the menace of commitment. This noble stand for the independence of the Bar would of itself have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanour during the struggle, no less than its spirit, and the felicitous precision with which he noted out the requisite and justifiable portion of defiance. The example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England.

Here it was obvious the juror was in the wrong, and Mr. Payne, the judge, was in the wrong for not checking him, and so Mr. Pater was in the right. Nor were there wanting similar instances in our own times, and even among some of those who were now on the bench. The Lord Chief Justice, when at the bar, had not shrunk from warmly remonstrating with a judge for some observation which showed a disposition to prejudge the case; and two or three years ago Mr. Serjeant Shee, now on the bench, took a

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similar course in a case in which a juror showed a strong feeling against his client, and the learned judge who presided fully approved that course. In the present instance the judge silently sanctioned the improper conduct of the juror, and then, when the counsel remonstrated, fined him for contempt. Such a precedent would be most dangerous, and would afford to arbitrary Judges and Courts of Quarter Sessions all over the country a very easy method of silencing a spirited counsel: (*Burdett v. Abbott*, 4 B. & Ald. 218; *Rex v. Clement*, 14 East, 1).

COCKBURN, C.J.—I am of opinion that this rule must be discharged. There can be no doubt that the Court of Quarter Sessions, being a court of record, has attached to its jurisdiction, and inherent in it, a power to punish for contempt. I agree that the Court of Quarter Sessions is, although a court of record, a court of inferior jurisdiction, and that this Court has authority to intervene to restrain any usurpation of jurisdiction, and that if the Court of Quarter Sessions having power to commit or fine for contempt, treats that as a contempt which there is no reasonable ground for so treating, this Court may interfere to protect the party against whom the power has been improperly exercised. That being so, the question is whether in this case the jurisdiction has been exercised without anything to ground or warrant such an exercise of it. It is plain that we must not take upon ourselves the power or the functions of a court of appeal in matters of this kind from the decision of the Court of Quarter Sessions, and that all we can do is to see whether the Court had jurisdiction in the matter complained of. That doctrine is laid down by Lord Denman in the case of *Carus Wilson*, in which a *habeas corpus* was issued to Jersey in consequence of Mr. Carus Wilson having been committed for a contempt of the Royal Court in that island. That being a colonial court, and Mr. Wilson being in custody under a sentence of the court, this Court had authority to issue a *habeas corpus*, and the question was whether Mr. Wilson had or had not committed a contempt. Lord Denman (7 Q. B. 1014) said: "I profess to decide this upon what I find as the practice of the Royal Court. We gave full credit to that Court for knowing and administering their own law. We find the party sent to prison in consequence of a supposed contravention of the law, by which those who show want of respect to the bailiff are to be sent to prison until they have asked pardon and have paid the fine imposed. Had anything positively absurd or unjust appeared, we might have acted as repeatedly has been done in cases where we have seen that the colonial courts have pronounced judgment against a party who has had no opportunity of making his defence. But here it appears a contempt was supposed to have been committed. That is a case in which it becomes the unfortunate duty of a Court to act as both party and judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return that they have come to a wrong conclusion. A Court may be insulted by the most innocent words uttered in a peculiar manner and

tone. The words here might or might not have been contemptuous, according to the manner in which they were spoken, and that is what we must look to. If the words were contemptuously spoken, that was an ample question for the decision of the Royal Court, with which no other Court can meddle. Every court in such a case as that forms its own judgment. We must always feel most unwilling to interfere in this way; indeed, the practice has been almost discontinued for a century, and there is no judge who would not be extremely grieved at finding himself compelled to exert the power. As to the question whether it sufficiently appears for what pardon is to be asked, I agree that it is shewn to be for want of respect. The Court had adjudged the fact of want of respect, and had a right to order reparation; having called for it, the law left them no choice as to the mode in which they were to enforce their demand." There Lord Denman took the same view which I have entertained throughout, that this Court can only look to see that there is evidence upon which the inferior court could reasonably come to the conclusion that a contempt has been committed, and that this Court cannot try the effect of the evidence one way or the other. I protest against the exercise of any appellate jurisdiction in the matter. If there was nothing that could be fairly construed to be a contempt, we ought to protect a party from being improperly punished for contempt, but we are not to decide as a jury upon the evidence whether the Court was right or wrong in coming to a conclusion upon the conflict of facts. In this case, it appears that Mr. Pater was fined for words uttered by him; the words in themselves are words which any counsel might have uttered in the honest discharge of his duty, and though they might have been harsh and unpleasant and offensive to the jurymen to whom they applied, and who was affected by them, that would be within the right and privilege of counsel, and ought not to be construed into a contempt. But although they were used in the course of his address to the jury, if they were not used for the purpose of inducing the jurymen to come to a conclusion favourable to the interests of his client, but for the purpose of wantonly, and unnecessarily and unjustifiably insulting him, then they are an abuse of the privilege of counsel, and the Court might properly treat them as a contempt, and punish in such a way as contempt can be punished. Mr. Pater denies on oath that he did use these words as a contempt of Court, and I think that we should give the most unbounded credit to what he states; but unfortunately Mr. Pater at the time allowed his temper to get the better of his judgment, and did not do what I am quite sure he would have done on reflection, when he found that the judge put an unfavourable construction on his language, and what no gentleman ought to be ashamed of doing if he has used language ambiguous and capable of being interpreted as contemptuous and insulting—at once explain his meaning. Instead of doing that, he persisted in the words, and, I think, with the construction which Mr. Payne put on them. Having done so, he must take the

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consequence of his want of discretion and good taste. There had been an altercation of an unpleasant character between Mr. Pater and the foreman of the jury, and I regret that the foreman of the jury was allowed to make the observations which he did without the interposition of the Court. It would have been much more conducive to the upholding of the dignity of the Court if the learned judge had told the jurymen that if he had any observations to make the proper way was to make them to himself, and not to get into an altercation with counsel. Mr. Pater had so far forgotten himself as to say to the jurymen first, "You had better not get into collision with me," which must be construed into a sort of threat that he would be roughly and unpleasantly handled if he did; and then he told him that he ought to be removed from the jury-box and another man put in his place. These offensive observations might be well taken as giving a meaning and sense to the words afterwards used which otherwise they would not be capable of, and I think that in justice to Mr. Pater I ought to say, that if he believed they had not that meaning he would not have taken the course he did. When again Mr. Pater addressed the jury on the part of the prisoner, he made use of the words upon which the Court proceeds to fine him for contempt. Certainly these words are capable of a twofold construction. They might have been intended as an appeal from the foregone conclusion of the one jurymen to the rest of the jurymen sitting in the box, or they may be taken in the sense in which Mr. Payne considered them to be used. Now, Mr. Payne did not proceed at once to inflict the fine as for contempt of Court, or for the insult to the jurymen, but he says to Mr. Pater, "You really should not use that language to a gentleman discharging an important duty, because it implies that you mean to say that, in spite of the evidence, he will convict your client, simply because he has had a conflict and a dispute with you." If Mr. Pater's temper had not got the better of him, I should think that he would have said directly, "That is not the sense in which I meant those words," and that he would have said to the jury, "This gentleman seems to have taken a strong view of the case, and I appeal to the rest of the jury not to be led away or influenced by him." That would have deprived the words of their offensive character; but instead of that, although Mr. Pater had heard the construction put upon the words, he not only did not retract, but said that he would repeat them until the end of time. Having used language capable of a twofold construction, and having been addressed, "Your language may mean an insult, do you mean it that sense?" and having giving no explanation, but persevering in the words, and saying "I will persevere in the words as much as I please," the fair and reasonable inference any one would draw from that is, that Mr. Pater intended to persevere in that which he had stated. Then, having had time to cool and get rid of the heat of the moment, the Assistant-Judge, Mr. Bodkin, comes in, and Mr. Pater is again asked to withdraw the language or qualify it; yet not a single word is said by way of inti-

mation that he had no intention of insulting the juryman, but he perseveres in that language after the construction put on it as being offensive. A man called on to apologise where no apology is required, is justified in saying, "I refuse, because I have nothing to apologise for;" but here the language is capable of a twofold construction, and as Mr. Pater persevered in it without saying that he did not mean it in an offensive sense, I cannot help thinking that he used it for an offensive purpose. It comes to this, can we under the circumstances say that the presiding judge, Mr. Payne, with the assistance of Mr. Bodkin, came to a conclusion so unreasonable and so utterly wrong that we are bound to say that the Court of Quarter Sessions had no jurisdiction to fine Mr. Pater for contempt? I cannot come to that conclusion. I regret this unfortunate result. No man has a higher sense of the importance of the rights and privileges of counsel in discharge of their arduous and important duties, and I should regret if they had not that privilege, not for their sake only, but for the sake of the whole community; but on the other hand, we are bound to protect jurymen who cannot protect themselves, and who have no means of fining for contempt; or taking any other course for resisting indignity and insult if offered to them. We must look to both sides, and if we see that there were fair and reasonable grounds for saying that insult was offered to the jury, while we ought to uphold the privileges of counsel, we ought not to say that that does not amount to such a contempt as the Court is empowered to inflict punishment for. I regret I am bound to come to this conclusion, but under the circumstances we should not be justified in interfering with the decision of the Court of Quarter Sessions.

BLACKBURN, J.—I am of the same opinion. It is very important to bear in mind the distinction my Lord has pointed out between our being a court of appeal, and a court of supervision over inferior tribunals. This Court has the power of keeping all inferior tribunals within their jurisdiction. But if the inferior court has reasonable evidence on which that court could draw the conclusion that facts existed which gave them jurisdiction, and they have drawn that conclusion upon reasonable grounds, we cannot weigh whether there was other evidence that might tend to an opposite conclusion. And if we do not draw the same inference as the inferior court, all we can say is that the court had reasonable grounds for drawing the inference, and that would support the judgment. Looking at "contempt" in the sense in which Lord Denman uses it, and which is rather a happy one, I agree that you are to judge of contempt by gesture and tone. I also agree that we are to see whether the Court of Quarter Sessions had the power which it has exercised. Now a Court of Quarter Sessions is a court of record, and it has, as incident to it, like every other court of record, necessary power to prevent that, which done in the face of the court, leads to the obstruction of the administration of justice, and it must have power to treat such an obstruction as a contempt. If what is so done be not warranted by law, or it be

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an unwarrantable interference with the proceedings, although it may be by counsel, still if it be an unwarrantable obstruction that would be a contempt. I do not doubt that if counsel under colour of addressing the Court, takes the opportunity of obstructing the course of justice by insulting a jurymen or the Court, that would be a contempt of the Court, and would justify the imposition of a fine and committal if necessary. Then in this case was that so? Considering how wide and extensive the privilege of counsel is, and that for the public interest, nevertheless there is tolerable strong ground for saying that the language used, although it would certainly be within the privilege of counsel, if used in the defence of his client, was not so used, but was really used by way of insult to the jurymen in revenge for a previous remark. It is not for me to say whether I draw that conclusion. I wish not to be understood as expressing my own opinion; but as Mr. Payne under the circumstances drew the conclusion that it was used in that way, we are now to see whether he drew that conclusion without any reasonable ground for it. I do not wish to repeat the grounds stated by my Lord, and I quite concur that Mr. Payne, as the Judge of the Court of Quarter Sessions, had reasonable grounds on which he might draw the conclusion that Mr. Pater, as counsel for the prisoner, was not acting as such at the time, but was obstructing the due course of the business of the court, by insulting the jurymen in revenge for a previous squabble. We do not inquire who was in the right or who was in the wrong. MELLOR, J. and SHEE, J. concurred in the judgment.

Rule discharged.

WESTERN CIRCUIT.

DEVON SUMMER ASSIZES, 1864.

Exeter, July 23.

(Before Mr. Justice BYLES.)

REG. v. HUTCHINSON. (a)

Manslaughter by negligence—Liability of officers of the army.

A gun discharged in the ordinary and regular course of ball practice by an artilleryman in a garrison town, missed the mark, and killed a man who was lawfully passing near the spot in a boat, the place being a public one and open to all Her Majesty's subjects. The artilleryman who fired the gun was acting under the command of a superior officer, who was acting in obedience to the general orders of the major-general :

Held, that the major-general was not guilty of manslaughter.

The liabilities of officers and soldiers for the consequences of acts done in obedience to their orders considered.

THE defendant, Major-General Hutchinson, was found, by the coroner's inquisition, guilty of manslaughter, in having caused the death of a boatman under the following circumstances:—

The defendant was commandant of the forces at the garrison in Plymouth. A target was placed in the Sound, under the general directions of the Horse Guards, and the artillerymen were accustomed to practice by firing at it with ball. On the 2nd of July, 1864, while such practice was proceeding, a ball missed the target, and striking the waves, ricocheted, and hit a boatman who was taking a boat across the Sound, in the lawful and proper exercise of his vocation, and in a place where he might lawfully be.

Lopes appeared for the prosecution.

E. W. Cox for the defendant.

The grand jury having thrown out the bill, the jury were charged on the coroner's inquisition.

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

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Lopes said that having read the remarks made by his Lordship to the grand jury, and entirely agreeing with the views of the law applicable to it which had been there so ably laid down, and considering also that the bill of indictment which had been preferred had been thrown out by the grand jury, he should offer no evidence; but he trusted that the authorities would take some means to protect the public against the danger of the ball practice, which had been often complained of in vain, and of which their worst predictions had been verified.

BYLES, J., said that the counsel for the prosecution had adopted a very proper course; indeed, in no case could he permit a trial to take place on the coroner's inquisition, where the grand jury had thrown out a bill for the same offence, for to do so would be to constitute the petty jury a court of appeal against the grand jury. He would not now repeat the remarks he had made when addressing the grand jury, and they would merely say that the prisoner was

Not guilty.

The following were the comments addressed to the grand jury, and referred to in the remarks to the petty jury, and which contain so excellent and useful a summary of the law bearing upon this case that we place it upon record:—

BYLES, J.—There was one case of an unusual kind, and no doubt it would require their full and attentive consideration. He could only collect the facts from the depositions taken before the coroner, which were extremely long and very vague, so that he hardly knew in what shape the charge would be presented to them. All he could do would be to call their attention to an outline of the facts, and to remind them of the law which governed the imputed offence, and the evidence given in support of it. The defendant was a gentleman of high rank, a general in Her Majesty's army; he had the command of the forces in the western district; and it appeared that on the 2nd of July firing practice took place from the battery over Plymouth Sound. One of the balls—whether it turned to the right or the left he could not tell—passed through the bottom of a boat, unfortunately striking the deceased, breaking both his legs and his spine, and the unhappy man, who was only nineteen years of age, died in a short time afterwards. Some persons, who were happily at hand, saved the other persons who were in the boat. The defendant had the general superintendence and control, and it was alleged that he was responsible for the act. He begged to remind them that manslaughter was when one man was killed by the culpable negligence of another. A slight act of negligence was not sufficient—all men and women were negligent at some time; it would depend upon the degree of negligence. A slight deviation from proper care and skill was not sufficient; it must be culpable negligence. By way of illustration, suppose a man were to fire a gun in a field where he saw no one, and as he fired another man suddenly raised his head from a ditch; he could not say that that

man would be guilty of manslaughter: it would be held not to be culpable negligence. But, supposing a man were to fire down the High-street of Exeter because he saw no one, and some one was suddenly to appear and he was killed, that would be culpable negligence in the man who fired the gun. There was one observation he must make. It would seem, and he thought the result showed it, that the boat was within the range of fire; but that was no defence. If the unfortunate man had not been killed and had brought an action for damages, or if his wife and family under Lord Campbell's Act had brought an action, if he had in any degree contributed to the result he could not maintain an action. But in a criminal case it was different. The Queen was the prosecutor, and could be guilty of no negligence; and if both the parties were negligent, the survivor was guilty, and therefore it was no defence that the boat was within the danger. He could only speculate upon the negligence imputed in this case. First, he did not know that it would be said that it was an improper place, whether to fire from, or to fire over. The gun was fired from one of the batteries kept on purpose for practice. It was said that this battery was too low, but that was not the point of defence. Therefore, subject to their better judgment, nothing could be imputed to the defendant as to the place whence the gun was fired. Then as to the place over which it was fired. Had the defendant the selection of it? Then, in using the place, although an improper one, was he obeying military orders? If so, he would not be guilty. But, supposing it was a place in some degree improper, in some degree dangerous, and he had selected it, still it did not follow that he would be guilty. Common danger did not make the place improper. He was a man performing a most important duty. Supposing, therefore, that the defendant had been personally engaged in this firing, if he thought that the place from which the gun was fired was not improper, and that the place to which the firing was directed was not improper, assisted by additional precautions which might be used, he would not be responsible, because he was acting under the direction of superior authority. It seemed that complaints had been made by a great many persons residing in Plymouth and Devonport, and he must beg their attention to the orders the defendant had given. The major-general would impress upon the officers in command to see with the utmost diligence that the range was free before the firing. Then, there was a second order. The major-general strictly impresses upon the officers the necessity of seeing that all was free, as he should hold them personally responsible. He had hitherto presumed that the defendant had personally to do with the firing; and if he had, he would not be guilty of manslaughter. But the next question was, did he personally superintend the firing, or did he not? They would see whether he did or not. Was he guilty of a breach of duty in not personally superintending the firing? He could not see that he was. Again, it might be said that if he had issued orders it was his duty to see that proper

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persons were appointed to keep a proper look-out ; and if proper persons were nominated by him it did not appear whether they were properly disciplined, and it might be a question whether there was any negligence in them. There were persons with flags, but whether a proper look-out was kept might possibly be doubtful ; whether means were taken for keeping a proper look-out they would have to determine. Under these circumstances it would be for them to say whether negligence was brought home to the defendant. If they considered it was brought home to him he knew they would find the bill. It would be an insult to them to insinuate that they would not do their duty. They would treat the defendant exactly as they would treat any person in an inferior position. They would not neglect to find the bill if it ought to be found, and no prejudice would weigh upon them to find the bill if it ought to be thrown out.

WESTERN CIRCUIT.

DEVON SUMMER ASSIZES, 1864.

Exeter, July 25.

(Before Mr. Justice BYLES.)

REG. v. SLEEP. (a)

Concealment of birth.

endeavour to conceal the birth of a child by a secret disposition of dead body within the meaning of the statute 24 & 25 Vict. c. 100, must be by putting it into some place where it is not likely to be found. Placing it in an open box in the prisoner's bedroom, and afterwards, on inquiry by the medical man, informing him that the child was in the box where it was found, is not a secret disposition within the statute.

PRISONER was indicted for concealing the birth of her child.

E. W. Cox for the prosecution.

S. J. Cox for the prisoner.

Facts, briefly stated, were that the prisoner was in service. She denied to her mistress that she was in the family-way.

On 13th of June she did not come down stairs until after the morning, and appeared very ill. Her mistress sent for a doctor, and asked the prisoner if she had not been confined. Prisoner said she had not.

The doctor asked her, what she had done with the child. She said it was in a box in her bedroom. He went to the box and found the child in an open box, having the cover removed.

S. J. Cox submitted that this was no evidence of concealment.

E. W. Cox said that the only question was when the offence was completed. The child was placed in a box. If that was a secret disposition of the body for the purpose, at the time of placing

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

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it there, of endeavouring to conceal the birth, the offence was then complete, and the subsequent admission to the medical man would not condone it.

BYLES, J., to the jury.—The words of the statute are, “If any woman shall be delivered of a child, every person who shall by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanour.” There must be secret disposition for the purpose of concealing the birth. The concealment must be by a secret disposition of the body, and a disposition could only be secret by placing it where it was not likely to be found. Secrecy was the essence of the offence. Could they say that an open box in the prisoner’s bedroom was a secret disposition. It was for them to say, but in his opinion it was not.

Not guilty.

APPENDIX.

STATUTES AND PARTS OF STATUTES

OF THE CRIMINAL LAW PASSED IN THE SESSIONS OF
PARLIAMENT, 1860 AND 1861.

ADMINISTERING OF POISON ACT.

23 VICT. CAP. 8.

amend the Law relating to the unlawful administering of
-[23rd March, 1860.]

BEAS the present law has been found insufficient to protect
persons from the unlawful administering of poison, except in
the intent is to commit murder: be it enacted by the
most excellent Majesty, by and with the advice and consent of
spiritual and temporal, and Commons, in this present Parlia-
ment, and by the authority of the same, as follows:

That whosoever shall unlawfully and maliciously administer to Any person
be administered to or taken by any other person any poison or maliciously
destructive or noxious thing so as thereby to endanger the life of administering
him, or so as thereby to inflict upon such person any grievous poison, &c.,
harm, shall be guilty of felony, and being convicted thereof shall with intent to
be sentenced to penal servitude for any period not exceeding endanger life
and not less than three years, or to imprisonment for any term or inflict
more than three years, with or without hard labour, at the discretion grievous bodily
harm to be
guilty of felony.

Whoever shall unlawfully and maliciously administer to or cause Any person
administered to or taken by any other person any poison or other maliciously
destructive or noxious thing with intent to injure, aggrieve, or annoy administering
him, shall be guilty of a misdemeanor, and being convicted poison, &c.,
shall be liable to be sentenced to imprisonment for any period not with intent to
three years, with or without hard labour, at the discretion of injure, aggrieve,
and the costs and expenses of the prosecution of any such or annoy any
other person, to
may be allowed by the court as in cases of felony. be guilty of a
misdemeanor.

Upon the trial of any person charged with the felony above If the jury be
the jury shall not be satisfied that such person is guilty not satisfied
shall be satisfied that he is guilty of the misdemeanor above that any person
then and in every such case the jury may acquit the accused charged is
guilty of felony,
and find him guilty of such misdemeanor, and thereupon but guilty of
misdemeanor,
they may find
him guilty
accordingly.

II.

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prisoner to any other registered hospital, or to any lunatic asylum or house licensed for the reception of lunatics, or to the care or charge of any person mentioned or named in such warrant for this purpose, and every such warrant shall be made in duplicate, and one of the duplicates shall be delivered to and left with the superintendent of the said hospital of Bethlehem, and the other duplicate shall be delivered to and left with the superintendent or proprietor of the hospital, asylum, or house into which or the person into whose care or charge the prisoner is ordered to be removed, and such warrant shall be a sufficient authority for the removal of such prisoner, and also for his reception into the hospital, asylum, or licensed house into which or by the person into whose care or charge he is ordered to be removed, and thereafter the authority of the Secretary of State in relation to the prisoner so removed shall cease.

23 & 24 Vict.
c. 60.

Queen's Prison
Act.

2. Any prisoner removed under this act to any hospital, asylum, or licensed house, or into the care or charge of any person other than the person upon whose application the warrant of the Secretary of State is mentioned to have been made, shall be considered and treated as an ordinary lunatic patient, under the acts for the regulation of the care and treatment of lunatics, and the said applicant for the warrant shall have the same powers, rights, and liabilities as if he had signed an order for the reception of the lunatic under the said acts, upon which such lunatic had been lawfully received into such asylum, registered hospital, or licensed house, or by the person into whose care or charge he is removed.

Lunatics removed from Bethlehem under this act to be within the provisions of the Lunacy Acts.

CRIMINAL LUNATIC ASYLUM ACT.

23 & 24 VICT. CAP. 75.

An Act to make better Provision for the Custody and Care of Criminal Lunatics.—[6th August, 1860.]

WHEREAS by the act of the session holden in the thirty-ninth and fortieth years of King George the Third, chapter ninety-four, and the act of the session holden in the third and fourth years of Her Majesty, chapter fifty-four, Her Majesty is empowered, where any person is charged with any such offence as therein mentioned, and acquitted on account of insanity, and where any person is indicted for any offence and upon an arraignment is found insane, to give order for the safe custody of such person during her pleasure, in such place and in such manner as she may think fit; and by the said act of the third and fourth years of Her Majesty one of Her Majesty's principal Secretaries of State is empowered, upon such certificate as therein mentioned of the insanity of any person imprisoned as therein mentioned, to direct such person to be removed to such county lunatic asylum, or other proper receptacle for insane persons, as the said Secretary of State may judge proper and appoint: and whereas by the acts of the session holden in the fifth and sixth years of Her Majesty, chapter twenty-nine, and of the session holden in the sixth and seventh years of Her Majesty, chapter twenty-six, the said Secretary of State is empowered to order any convict

39 & 40 Geo.
c. 94—3 & 4
Vict. c. 54—
5 & 6 Vict.
c. 29—6 & 7
Vict. c. 26.

23 & 24 Vict.
c. 75.

*Criminal
Lunatic Asylum
Act.*

Her Majesty
may appoint
asylum for
criminal
lunatics.

Secretary of
State may
direct criminal
lunatics to be
confined in the
asylum.

Nothing to
affect the
authority of
the Crown to
make other
provision for
the custody of
a criminal
lunatic.

Secretary of
State to appoint
council of super-
vision and
officers for
asylums.

in Pentonville or Millbank prison becoming or found insane during confinement to be removed to such lunatic asylum as the said Secretary of State may think proper: and whereas it is expedient that provision should be made for the custody and care of criminal lunatics in an asylum or asylums appropriated to that purpose: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. It shall be lawful for Her Majesty from time to time, by warrant under her royal sign manual, to appoint that any asylum or place in England which Her Majesty may have caused to be provided or appropriated, and may deem suitable for this purpose, shall be an asylum for criminal lunatics, and the provisions of this act shall be applicable to every such asylum.

2. It shall be lawful for one of Her Majesty's principal Secretaries of State, by warrant under his hand, to direct to be conveyed to and kept in any such asylum any person for whose safe custody during Her pleasure Her Majesty is authorized to give order, or whom such Secretary of State might direct to be removed to a lunatic asylum under any of the acts hereinbefore mentioned, or under any other act of Parliament, or any person sentenced or ordered to be kept in penal servitude, who may be shown to the satisfaction of the Secretary of State to be insane, or to be unfit from imbecility of mind for penal discipline; and the Secretary of State may direct to be removed to and kept in such asylum any such persons as aforesaid, who, under any previous order of Her Majesty or warrant of the Secretary of State, may have been placed and remain in any county lunatic asylum, or other place of reception for lunatics, and every person directed by the Secretary of State to be conveyed or removed to and kept in an asylum under this act, shall be conveyed to such asylum accordingly, and shall be kept therein until lawfully removed or discharged, and that with every person so conveyed or removed there shall be transmitted a certificate, as set forth in Schedule A. to this act annexed, duly filled up and authenticated, the contents of which certificate shall be transcribed into the general register to be kept in every such asylum.

3. Nothing in this act shall restrain or affect the authority of Her Majesty, where she may so think fit, to give such other order for the safe custody of any such person as aforesaid as she might have given if this act had not been passed, or restrain or affect the authority of the Secretary of State to continue in or direct to be removed to any county asylum or other place for the reception of lunatics any of the persons aforesaid whom he might have so continued or directed to be removed if this act had not been passed.

4. It shall be lawful for the Secretary of State from time to time to appoint any such persons as he may think fit, being not less than three in number, to be a council of supervision for any asylum under this act, and to remove all or any of the said council, and upon the removal, death, or resignation of any member of the said council, to appoint another in his place; and also from time to time to appoint for the asylum a resident medical superintendent, a chaplain, and such other officers, assistants, and servants as he may deem necessary, and at pleasure to remove such superintendent, chaplain, officers, assistants, and servants respectively; and the Secretary of State, with the approval of the Commissioners of

Her Majesty's Treasury, shall fix the salaries to be paid to the superintendent, chaplain, officers, assistants, and servants of such asylum. 23 & 24 Vict. c. 75.

5. It shall be lawful for the Secretary of State from time to time to make rules for the government and management of the asylum, and for the duties and conduct of the officers thereof, and for the care and treatment of the persons confined therein, and to subscribe a certificate that they are fit to be enforced, and such rules, when so certified, shall be binding on the council, and all officers, assistants, and servants of the asylum, and all other persons whomsoever, and all such rules shall be laid before Parliament within twenty-one days after they shall be certified, or if Parliament be not sitting then within twenty-one days after the next meeting of Parliament. *Criminal Lunatic Asylum Act.* Secretary of State to make rules for the government of the asylum.

6. Subject to the rules certified by the Secretary of State under this act, the council of supervision shall superintend and direct the management and conduct of the asylum, and the care and treatment of the lunatics confined therein; and such council or any two of them shall from time to time, as by the rules shall be provided, and at such other times as they may think fit, report in writing to the Secretary of State in relation to the management and conduct of the said asylum and the condition thereof, and to any matters concerning the same; and if any person detained and confined as aforesaid shall be of a religious persuasion differing from that of the Established Church, a minister of such persuasion at the special request of such person or of his friends or relations shall be allowed to visit him at proper and reasonable times by application to the medical superintendent, and under such rules as may be approved of by the Secretary of State, but no such person shall be compelled to attend any of the ordinances or instructions of any religious persuasion other than his own. Subject to such rules, council to superintend asylum.

7. The provisions of the acts hereinbefore mentioned, or of any other act for the removal or discharge of lunatics, whom the said Secretary of State is, under the hereinbefore mentioned acts or any other act now in force, authorized to direct to be removed to any lunatic asylum, shall extend and apply to any lunatic whom the Secretary of State may direct to be conveyed to any asylum for criminal lunatics appointed under this act: provided always, that any order for removal or discharge which may now be made by the Secretary of State on the certificate of two physicians or surgeons may be made on the certificate of the resident medical superintendent of the asylum and any two of the council of supervision. Provision as to removal and discharge of lunatics.

8. Provided also, that where by reason of the expiration of his term of imprisonment or penal servitude, or otherwise, a person confined in the asylum would be entitled to his discharge if duly certified to have become of sound mind, it shall be lawful for the Secretary of State by his warrant to order the discharge of such person, although he may not have been certified as aforesaid, to the intent that he may be placed in a county lunatic asylum, or otherwise subjected to the same care and treatment as lunatics not being criminals. Provision for discharge of persons confined after their term of imprisonment has expired.

9. Provided also, that it shall be lawful for the Secretary of State by his warrant to permit any person confined in the asylum to be absent from such asylum upon trial for such period as he may think fit, or to permit any such person to be absent from such asylum upon such conditions in all respects as to the Secretary of State shall seem fit, and in case any person so permitted to be absent upon trial for any period do not return at the expiration of such period, or in case any of the Secretary of State may permit any lunatic to be absent from asylum on trial, &c.

- 23 & 24 Vict.
c. 75.
*Criminal
Lunatic Asylum
Act.*
Provisions of
3 & 4 Vict.
c. 54, as to
expenses of
conveyance and
maintenance to
apply to this
act.
- Lunatics
escaping may
be retaken by
superintendent,
&c.
- Punishment of
persons for
rescue or per-
mitting escape.
- Penalty on
officers or ser-
vants ill-treat-
ing lunatics.
- Commissioners
in Lunacy to
visit asylums.
- And report to
Secretary of
State.
- conditions on which any person is so permitted to be absent be broken, the person not returning at such expiration or absent after any such condition has been broken, as the case may be, may be re-taken as herein provided in the case of an escape.
10. All provisions in the said act of the third and fourth years of Her Majesty for the payment of the conveyance of such insane persons as therein mentioned to any asylum or other receptacle, and of his maintenance therein, shall extend and be applicable to the conveyance of any such person to any asylum for criminal lunatics, and his maintenance therein, and all sums payable under any order made under such provisions shall be paid and applied towards defraying or reimbursing the expenses in respect of which the same are paid, or other expenses of the asylum, as the Commissioners of Her Majesty's Treasury may direct.
11. In case of escape of any person confined in any asylum for criminal lunatics, he may be retaken at any time by the superintendent of such asylum, or any officer or servant belonging thereto, or any person assisting such superintendent, officer, or servant in this behalf, or any other person authorized in writing in this behalf by the Secretary of State or such superintendent, and conveyed to and received and detained in such asylum.
12. Any person who rescues any person ordered to be conveyed to any asylum for criminal lunatics during the time of his conveyance thereto, or of his confinement therein, and any officer or servant in any asylum for criminal lunatics, who through wilful neglect or connivance permits any person confined therein to escape therefrom, or secretes, or abets, or connives at the escape of any such person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding four years, or to be imprisoned for any term not exceeding two years, with or without hard labour, at the discretion of the court, and any such officer or servant who carelessly allows any such person to escape as aforesaid, shall on summary conviction before two justices of such offence, forfeit any sum not exceeding twenty pounds nor less than two pounds.
13. Any superintendent, officer, nurse, attendant, servant or other person employed in any asylum for criminal lunatics who strikes, wounds, ill-treats, or wilfully neglects any person confined therein, shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, and on conviction under the indictment to fine or imprisonment, with or without hard labour, or to both fine and imprisonment, at the discretion of the court, or to forfeit for every such offence, on a summary conviction thereof before two justices, any sum not exceeding twenty pounds nor less than two pounds.
14. Two or more of the Commissioners in Lunacy, one at least of whom shall be a physician or surgeon, and one at least a barrister, shall, once or oftener in each year, on such day or days, and at such hours of the day, and for such length of time as they think fit, and also at any time when directed by the Secretary of State, visit every asylum for criminal lunatics, and shall inquire as to the condition, as well mental as bodily, of the persons confined therein, or any of them, and shall also make such other inquiries as to such asylum as to them may seem proper, or as such Secretary of State may direct.
15. The Commissioners in Lunacy shall in the month of March in every year report to one of Her Majesty's principal Secretaries of State

the visits made as aforesaid in the preceding year, and all such particulars in relation to every asylum visited as aforesaid as they think deserving of notice, and shall also report in like manner in relation to any visit made by the direction of the Secretary of State, as soon as conveniently may be after such visit, and a copy of every such report shall be laid before Parliament within twenty-one days after the receipt thereof, or if Parliament be not sitting, then within twenty-one days after the next meeting of Parliament.

23 & 24 Vict.
c. 75.

*Criminal
Lunatic Asylum
Act.*

SCHEDULE A.

STATEMENT respecting CRIMINAL LUNATICS to be filled up and transmitted to the MEDICAL SUPERINTENDENT with every CRIMINAL LUNATIC.

Name.....
Age
Date of admission.....
Former occupation.....
From whence brought
Married, single, or widowed
How many children
Age of youngest
Whether first attack
When previous attacks occurred
Duration of existing attack
State of bodily health
Whether suicidal or dangerous to others
Supposed cause
Chief delusions or indications of insanity.....
Whether subject to epilepsy
Whether of temperate habits.....
Degree of education
Religious persuasion
Crime ..
When and where tried
Verdict of jury
Sentence

ADMIRALTY COURT JURISDICTION ACT.

24 VICT. CAP. 10.

An Act to extend the Jurisdiction and improve the Practice of the High Court of Admiralty.—[17th May, 1861.]

SECT. 26. The Registrar of the said Court of Admiralty shall have power to administer oaths in relation to any cause or matter depending in the said court; and any person who shall wilfully depose or affirm falsely in any proceeding before the registrar or before any deputy or assistant registrar of the said court, or before any person authorized to administer oaths in the said court, shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attaching to wilful and corrupt perjury.

False oath or
affirmation
deemed perjury.

UNIVERSITY ELECTIONS ACT.

24 & 25 VICT. CAP. 53.

An Act to provide that Votes at Elections for the Universities may be recorded by means of Voting Papers.—[1st August, 1861.]

Voting papers
to be read, and
votes recorded.

Sect. 2. The voting paper, signed and certified as aforesaid, may be delivered to the vice-chancellor of the university for which the election is held, or to any pro vice-chancellor appointed by him, or, in the case of the University of Dublin, to the provost of Trinity College, or to any person lawfully deputed to act for him, at any one of the appointed polling places, during the appointed hours of polling, by any one of the persons therein nominated in that behalf, who shall, on tendering such voting paper at the poll, read out the same; and the said vice-chancellor, pro vice-chancellor, provost, or deputy shall receive the voting papers as the same shall be delivered, and shall cause the votes thereby given, or such of them as may not appear to be contrary to the provisions of this act, to be recorded in the manner heretofore used, in all respects as if such votes had been given by the electors attending in person; and all votes so recorded shall have the same validity and effect as if they had been duly given by the voters in person: provided always, that no person shall be entitled to sign or vote by more than one voting paper at any election, and that no voting paper containing the names of more candidates than there are burgesses to be elected at such election shall be received or recorded: provided also, that no voting paper shall be received or recorded unless the person tendering the same shall make the following declaration, which he shall sign at the foot or back thereof:

“I solemnly declare, that I am personally acquainted with *A. B.* [the voter], and I verily believe that this is the paper by which he intends to vote, pursuant to the provisions of the Universities Elections Act.”

Provided also, that no voting paper shall be so received and recorded if the voter signing the same shall have already voted in person at the same election: provided also, that every such elector shall be entitled to vote in person, notwithstanding that he has duly signed and transmitted a voting paper to another elector, if such voting paper has not been already tendered at the poll.

VACCINATION ACT.

24 & 25 VICT. CAP. 59.

Act to facilitate Proceedings before Justices under the Acts relating to Vaccination.—[1st August, 1861.]

Sect. 2. The guardians of any union or parish, or the overseers of any parish where the relief to the poor is not administered by guardians, may appoint some person to institute and conduct proceedings for the purpose of enforcing obedience to the said acts or any of them within any union or parish; and as to all expenses incurred by any person so appointed, or by any registrar of births and deaths, or by any medical officer of health appointed under an act of Parliament, in proceedings enforcing penalties under the said acts or any of them, if the justices of the peace before whom such proceedings are had certify that such expenses ought to be allowed, such court or justices shall ascertain the amount thereof, and such amount shall be payable out of the rates levied for the relief of the poor of the parish where the person for the time being dwells in respect of whose default or offence the same were instituted; and the court or justices shall ascertain the amount of such expenses. And proceedings for enforcing penalties under any of the said acts, on account of neglect to have a child vaccinated, may be taken any time during which the parent or guardian is in default.

As to institution of legal proceedings and payment of expenses of the same.

CRIMINAL PROCEEDINGS OATH RELIEF ACT.

24 & 25 VICT. CAP. 66.

Act to give relief to Persons who may refuse or be unwilling, from alleged conscientious Motives, to be sworn in Criminal Proceedings.—[1st August, 1861.]

WHEREAS it is expedient to grant relief to persons who may refuse or be unwilling, from alleged conscientious motives, to be sworn in criminal proceedings: be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. If any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit, Persons refusing from conscientious

24 & 25 Vict.
c. 66.

*Criminal
Proceedings
Oath Relief
Act.*

motives to be
sworn in
criminal pro-
ceedings to be
permitted to
make a solemn
affirmation or
declaration.

Punishment for
making false
affirmation.

Commencement
of act.

affidavit, or deposition in the course of any criminal proceeding, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following ; videlicet,

“ I *A. B.*, do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is according to my religious belief unlawful ; and I do also solemnly, sincerely, and truly affirm and declare,” &c.

Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

2. If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

3. This act shall come into operation on the first day of October in the year one thousand eight hundred and sixty-one.

INLAND REVENUE ACT.

24 & 25 VICT. CAP. 91.

An Act to amend the Laws relating to the Inland Revenue.—[6th August, 1861.]

No penalty for
letting for hire
a horse or
carriage to
convey a pri-
soner to gaol.

Sect. 16. No penalty under the fifteenth section of the act of the sixteenth and seventeenth years of the reign of Her Majesty, chapter eighty-eight, shall be deemed to be incurred in respect of the letting for hire of any horse or carriage for the purpose of conveying a prisoner to or from any prison, and used under such letting solely for that purpose.

DEALERS IN OLD METALS ACT.

24 & 25 VICT. CAP. 110.

An Act for regulating the Business of Dealers in old Metals.—[6th August, 1861.]

Sect. 3. In the construction and for the purposes of this act the term “dealer in old metals” shall mean any person dealing in, buying, and selling old metal, scrap metal, broken metal, or partly manufactured metal goods, or defaced or old metal goods, and whether such person deals in such articles only, or together with second-hand goods or marine stores, and the term “old metals” shall mean the said articles.

Definition of terms.

4. It shall be lawful for any justice of the peace, upon complaint made before him, upon oath, that the complainant has reason to believe and does believe that any old metal stolen or unlawfully obtained is kept in any house, shop, room, or place by any dealer in old metals within the limits of the jurisdiction of such justice, to give authority, by special warrant, to any constable or police officer to enter, in the daytime, such house, shop, room, or other place, with such assistance as may be necessary, and to search for and seize all such old metals there found, and to carry all the articles so seized before the justice issuing the said warrant, or some other justice exercising similar jurisdiction, and such justice shall thereupon issue a summons requiring such dealer to appear before two justices, at a time and place to be named in such summons, and if such dealer shall not then and there prove to the satisfaction of such justices how he came by the said articles, or if any such dealer shall be found in possession of any old metal which has been stolen or unlawfully obtained, and on his being taken or summoned before two justices it shall be proved to the satisfaction of such justices that at the time when he received it he had reasonable cause to believe it to have been stolen or unlawfully obtained, then in either of such cases such dealer shall be liable to a penalty not exceeding five pounds, and for any subsequent offence to a penalty not exceeding twenty pounds, or at the discretion of the justices in the case of such second or subsequent offence shall be imprisoned and kept to hard labour for any period not exceeding three calendar months: provided always, that nothing herein contained shall interfere with or affect any proceeding by indictment to which such dealer in old metals may be liable for feloniously and knowingly receiving stolen goods, but no person shall be prosecuted by indictment and proceeded against under this act for the same offence.

Penalty on dealer in old metals being in possession of stolen property.

5. When any dealer in old metals is convicted of either of the offences aforesaid, it shall be lawful for such justices, or, on proof of such con-

Justices may order dealer to be registered.

Dealers in Old Metals Act.

SCHEDULE.

Date of Registration.	Date of Conviction.	Period for which to be subject to Regulations of this Act.	Name.	Place of Abode and Business.

BANKRUPTCY AND INSOLVENCY ACT.

24 & 25 VICT. CAP. 134.

An Act to amend the Law relating to Bankruptcy and Insolvency in England.—[6th August, 1861.]

Sect. 145. Any person who shall wilfully and corruptly make any declaration for proof of debt as aforesaid, knowing the same, or the statement of account to which the same shall be appended, to be untrue in any material particular, shall be deemed guilty of a misdemeanor, and shall be liable to undergo the pains and penalties imposed upon persons guilty of wilful and corrupt perjury.

False declaration a misdemeanor.

205. If any person shall forge the signature of any commissioner, registrar, or of the master or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly concur in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such commissioner, registrar, master, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall be liable to the same punishment as any offender under the act of the session of Parliament of the eighth and ninth years of the reign of Her present Majesty, chapter one hundred and thirteen.

Forging signature of commissioner or officer, or seal of court, &c., felony.

As to misdemeanors under this act :

221. From and after the commencement of this act, any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute :

Penalty on persons guilty of misdemeanors herein named.

1. If he shall not upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing, to be served upon him personally or left at his usual or last known place of abode or business, and after the notice herein directed in the *London Gazette*, surrender himself to the court (having no lawful impediment allowed by the court), and sign or subscribe such surrender, and submit to be examined before such court from time to time :
2. If he shall not upon his examination fully and truly discover, to the best of his knowledge and belief, all his property, real and

24 & 25 Vict.
c. 134.

*Bankruptcy
and
Insolvency Act.*

- personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned, or transferred any part thereof, except such part as has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family, or shall not deliver up to the court, or dispose as the court directs of all such part thereof as is in his possession, custody, or power, except the necessary wearing apparel of himself, his wife and children; and deliver up to the court all books, papers, and writings in his possession, custody, or power relating to his property or affairs :
3. If he shall, after adjudication, or within sixty days prior to adjudication, with intent to defraud his creditors, remove, conceal, or embezzle any part of his property to the value of ten pounds or upwards :
 4. If, in case of any person having to his knowledge or belief proved a false debt under his bankruptcy, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof :
 5. If he shall, with intent to defraud, wilfully and fraudulently omit from his schedule any effects or property whatsoever :
 6. If he shall, after the filing of the petition for adjudication, with intent to conceal the state of his affairs, or to defeat the object of the law of bankruptcy, conceal, prevent or withhold the production of any book, deed, paper, or writing relating to his property, dealings, or affairs :
 7. If he shall, after the filing of the petition for adjudication, or within three months next before adjudication, with intent to conceal the state of his affairs, or to defeat the objects of the law of bankruptcy, part with, conceal, destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, paper, writing, or security, or document relating to his property, trade, dealings, or affairs, or make or be privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document, or writing relating thereto :
 8. If, within the like time, he shall, knowing that he is at the time unable to meet his engagements, fraudulently and with intent to diminish the sum to be divided amongst the general body of his creditors, have made away with, mortgaged, encumbered, or charged any part of his property, of what kind soever, or if after adjudication he shall conceal from the court or his assignee any debt due to or from him :
 9. If, being a trader, he shall, under his bankruptcy, or at any meeting of his creditors within three months next preceding the filing of the petition for adjudication, have attempted to account for any of his property by fictitious losses or expenses :
 10. If, being a trader, he shall, within three months next before the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary

course of trade, have obtained on credit from any person any goods or chattels with intent to defraud : 24 & 25 Vict.
c. 134.

11. If, being a trader, he shall, with intent to defraud his creditors, within three months next before the filing of the petition for adjudication, pawn, pledge, or dispose of, otherwise than by *bonâ fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for. *Bankruptcy and
Insolvency Act.*

222. If it shall at any time appear to any court under this act that the bankrupt has been guilty of any of the offences in the next preceding section set forth, such court shall have and may exercise such jurisdiction, rights, powers, and privileges, for the summoning, apprehending, committing, remanding, bailing, and otherwise proceeding in respect of such bankrupt, as are exercised by and vested in Her Majesty's justices of the peace in respect of persons against whom a charge or complaint shall have been made before any one or more of the said justices in respect of any felony or indictable misdemeanor committed within the limits of the jurisdiction of such justice or justices ; and all the provisions of the act of the session of Parliament of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-two, shall, with such variations as the nature of the case may require, extend and apply to the court, and to the Commissioners of the London and other district Courts of Bankruptcy, and to the judges of the County Courts acting in matters under this act, and their proceedings, as well as to justices of the peace and their proceedings. Jurisdiction
and powers of
commissioners
in proceeding
in respect of
bankrupt guilty
of any of offences
hereinbefore
named.

Provisions of
11 & 12 Vict.
c. 42, extended
to this act.

223. The court may direct that the creditors assignee, or, if there be no creditors assignee, the official assignee, or any of the creditors of the bankrupt, shall act as the prosecutor in respect of such offence, and shall give to such assignee or creditor a certificate of the court having so directed, which certificate shall be deemed sufficient proof of such prosecution having been directed as aforesaid ; and upon the production of such certificate the costs of such prosecution shall be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction, unless such last-mentioned court shall specially otherwise direct, and when allowed by any such court such sum so allowed shall be ordered by the said court to be paid and borne in all respects in the same manner as the expenses of prosecutions for felonies are now paid and borne, and the same shall be paid and borne accordingly ; and any expenses incurred by such prosecutor, other than those so defrayed in accordance with the next following clause, shall be paid out of the account intituled "The Chief Registrar's Account." Court may
appoint pro-
secutor.

Costs of pro-
secution.

224. The court may direct the assignees to lay the papers before the Attorney-General (or the Solicitor-General during a vacancy in the office of Attorney-General) for his direction thereon, either while the bankruptcy is pending before the court or when it has been brought to a conclusion. Power to court
to direct
reference to
Attorney-
General.

225. In any indictment or information for any misdemeanor under this act it shall be sufficient to set forth the substance of the offence charged, without alleging or setting forth any debt, act of bankruptcy, petition, or adjudication, or any summons, warrant, order, rule, or proceeding of or in any court acting under this act. Indictment.

24 & 25 Vict.
c. 134.

*Bankruptcy
and
Insolvency Act.*

Definition of
terms, &c.

"Annulling:"

"Assignees:"

"Bank of
England:"

"Bankrupt:"

"Commissioner," &c.

"Court:"

"Court of
Bankruptcy:"

"Creditor:"

"Creditors
present at any
meeting:"

"Gaoler:"

"Messenger:"

"Metropolitan
district:"

"Oath:"

"Affidavit:"

"Petition for
adjudication of
Bankruptcy:"

As to the definition and explanation of terms :

229. The terms and words hereinafter enumerated or explained, where-soever occurring in this act, shall be understood as hereinafter defined or explained, unless it be otherwise specially provided, or there be some-thing in the subject or context repugnant to such definition or expla-nation ; that is to say,

"Annulling" shall mean also "superseding:"

"Assignee" shall mean the assignee of the estate and effects of the bankrupt or petitioner, chosen by the creditors ; and until such assignee shall be chosen, or where no such assignee shall exist, shall mean the official assignee :

"Bank of England" shall mean also all branches or agents thereof :

"Bankrupt" shall mean any person who shall have been under any former acts, or who shall be by any court under the provisions of this act, adjudicated bankrupt :

"Commissioner," and "Commissioner of the Court of Bankruptcy," shall include the judge of any County Court entitled to act in bankruptcy under this act :

"Court," "the Court," "the Courts," shall mean the Court in Lon-don, or any country district court, or any County Court, acting under this act, according as such several constructions shall be consistent with the context :

"Court of Bankruptcy" shall mean Her Majesty's Court of Bank-ruptcy constituted under this act, and the Commissioners thereof :

"Creditor" shall mean also any two or more persons being partners, and incorporated and joint-stock companies :

"Creditors present at any meeting" shall include creditors who are represented by some person duly authorized by any such creditor in writing, and such authority shall not require a stamp :

"Gaoler" shall include the keeper or governor of any gaol or prison :

"Messenger" shall mean also and include his assistant or assistants, duly authorized by him to act as his deputy or deputies, when acting under order of the court :

"Metropolitan district" shall mean and include every parish the distance whereof as measured by the nearest highway from the General Post Office in London to the parish church of such parish shall not exceed twenty miles :

"Oath," "affidavit," shall mean and include the declaration or affir-mation of any person whom any act of Parliament shall have authorized to make such declaration or affirmation in lieu of an oath :

"Petition for adjudication" or "petition in bankruptcy" shall mean any petition by or against a debtor for adjudication of bankruptcy; and where in any act of Parliament, instrument, document, or other proceeding granted, executed, or made before the commencement of this act mention shall have been or shall be made of any fiat in bankruptcy, or commission in bankruptcy, such act, instrument, document, or proceeding shall be construed as though such fiat or commission had been a petition in bankruptcy under this act, so far as the circumstances will admit :

- “Petitioning creditor” shall mean the creditor who filed the petition for adjudication : 24 & 25 Vict.
c. 134.
- “Property” shall mean and include all the real and personal estate and effects of the petitioner or bankrupt within this realm and abroad (except as herein provided), and all the future estate, right, title, interest, and trust of such petitioner or bankrupt in or to any real or personal estate and effects, within this realm or abroad, which may revert, descend, be devised or bequeathed or come, and all debts due or to be due to him, before he shall have obtained his discharge : *Bankruptcy and Insolvency Act.*
“Petitioning creditor :”
“Property :”
- “Prisoner” shall mean any person in actual custody within the walls, rules, or liberties of any prison in England for any debt, damages, costs, sum or sums of money, or for any contempt by reason of nonpayment of any sum or sums of money or costs : “Prisoner :”
- “Proper County Court” shall mean the County Court within the district of which the debtor has resided or carried on business during the six months next immediately preceding the time of filing a petition under this act by or against him, or for the longest period during such six months : “Proper County Court :”
- “Sheriff” shall include sheriff substitute : “Sheriff :”
- “Suit” shall include action at law and suit at equity or other proceeding : “Suit :”
- For the purposes of this act, all persons shall be deemed traders who, prior to the commencement of this act would have been liable to be adjudicated bankrupt under the laws of bankruptcy then in force : “Trader :”
- “United Kingdom” shall mean the United Kingdom of Great Britain and Ireland : “United Kingdom :”
- In all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, Monday and Tuesday in Easter week, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusive of that day also. “Computation of time :”

STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF
PARLIAMENT OF 1862.

DISCHARGED PRISONERS AID ACT.

25 & 26 VICT. CAP. 44.

An Act to amend the Law relating to the giving of Aid to Discharged Prisoners.—[17th July, 1862.]

Gen. 4. c. 64 (1823) **W**HEREAS by the thirty-ninth section of an act passed in the session holden in the fourth year of King George the Fourth, chapter sixty-four, intituled *An Act for consolidating and amending the Laws relating to the building, repairing, and regulating of certain Gaols and Houses of Correction in England and Wales*, and hereinafter referred to as "the Gaol Act," it is provided that it should be lawful for any one or more of the visiting justices of any prison to which that act extended, from whence any prisoner should be discharged, to direct that such moderate sum of money should be given and paid to any and every such prisoner so discharged who should not have the means of returning to his or her family or place of settlement, or resorting to any place of employment or honest occupation, as, in the judgment of such justice or justices, should be requisite and necessary for such purpose, under all the circumstances attending the case of any such prisoner; and that such sum of money should be paid by the keeper of such prison, to or for the use of such prisoner for the purpose aforesaid, and that all such sums should be provided for, either out of such bequests or benefactions as therein mentioned, or in such manner as is by the Gaol Act directed with respect to the expense of the support and maintenance of the prisoners in the prisons to which such act extends: And whereas divers societies, hereinafter referred to as "Discharged Prisoners Aid Societies," have been formed in divers parts of England, by persons subscribing voluntarily, for the purpose of finding employment for discharged prisoners, and enabling them by loans and grants of money to live by honest labour: And whereas it is expedient that power should be given to the visiting justices of prisons to give aid under the said act to discharged prisoners through the medium of a Discharged Prisoners Aid Society, in cases where such society has been previously certified by the justices having jurisdiction over such gaol or house of correction, at some court of general or quarter sessions, or at some quarterly sessions held by them, to be a society approved of by them: Be it enacted by the Queen's most excel-

lent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. The justices having jurisdiction over any gaol or house of correction to which the Gaol Act extends may, at any court of general or quarter sessions, or at any quarterly sessions, upon the application of any one or more member or members of a Prisoners Aid Society, and after examining the rules of such society, and receiving such evidence as they think fit as to the condition of such society, issue a certificate under the hand of their chairman to the effect that such society is approved of by them for the purposes of this act; and they may, at any future court of general or quarter sessions, or at any future quarterly sessions, upon due cause shown, by a writing under the hand of their chairman, revoke or suspend such certificate; and any society in respect of which such certificate as aforesaid has been granted and remains in force shall be deemed to be a "Certified Prisoners Aid Society," and to be entitled to such privileges as are hereinafter mentioned.

Discharged Prisoners Aid Act.

Power to justices to grant certificates of approval of prisoners aid societies; and to revoke or suspend the same.

2. Where a prisoner is discharged from any prison to which the said Gaol Act extends, the visiting justices of such prison, instead of directing that such moderate sum of money shall be paid by the keeper of such prison to or for the use of such prisoner for the purpose aforesaid, may if they think fit direct that such sum, not exceeding in any case two pounds, shall be paid to the treasurer of a certified Prisoners Aid Society on their receiving from such society an undertaking in writing, signed by the secretary thereof, that the same shall be applied for the benefit of such prisoner: Provided that if it shall not be possible for the society so to apply such sum for the benefit of such prisoner, the same or so much thereof as shall not have been so applied shall be applied by such society for the benefit of such other prisoner or prisoners discharged from the said gaol as the said visiting justices shall direct.

Relief may be afforded by "certified prisoners aid society."

3. All sums paid to a certified Prisoners Aid Society under this act shall be provided for out of the same funds and in the same manner as is by the said Gaol Act directed with respect to the sums therein authorized to be given or paid as herein-before recited to discharged prisoners.

Funds out of which repayments provided.

TRANSFER OF LAND ACT.

25 & 26 VICT. CAP. 53.

An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estates.—[29th July, 1862.]

105. If in any proceeding to obtain the registration of any land, or any land certificate or certificate of title, or otherwise in any transaction relating to land which is or is proposed to be put upon the registry, any person acting either as principal or agent shall, knowingly and

Person making false statement guilty of misdemeanor.

25 & 26 Vict.
c. 53.

*Transfer of
Land Act.*

As to persons
aggrieved by
proceeding, &c.,
for any act de-
clared a misde-
meanor.

Answers to bills,
questions, &c.,
not admissible
in evidence.

Fraud a misde-
meanor.

Punishment.

Interpretation
of terms.

with intent to deceive, make or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal, or assist or join in or be privy to the suppressing, withholding, or concealing from any judge, or the registrar, or any person employed by or assisting the registrar, any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding three years, and either with or without hard labour, or to be fined such sum as the court by which he is convicted shall award: the act or thing done or obtained by means of such fraud or falsehood shall be null and void to all intents and purposes, except as against a purchaser for valuable consideration without notice.

106. No proceeding or conviction for any act hereby declared to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.

107. Nothing in this act contained shall entitle any person to refuse to make a complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or in the Court of Bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding.

138. If any person fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any order of the Court of Chancery in relation to registered land, or fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of the entry on the register of any caveat or notice of a charge, or of the erasure from the register or alteration on the register of any caveat or notice of a charge, such person shall be deemed to be guilty of a misdemeanor; and any order procured by fraud, and any act consequent on such order, and any entry, erasure, or alteration so made by fraud, shall be void as between all parties or privies to such fraud.

139. Any person convicted of a misdemeanor under the last preceding section shall be liable to imprisonment for any term not exceeding three years, with or without hard labour, or to be fined such sum as the court by which he is convicted shall think just.

140. In the construction of this act (except where the context or other provisions require a different construction), the word "person" shall include Her Majesty, Her heirs and successors, and the Duke of Cornwall for the time being, and also a body politic or corporate; the word "possession" shall include receipt of the rents and profits; the word "land" shall include messuages, tenements, and hereditaments, corporeal or incorporeal; and the word "incumbrance" shall mean any legal or equitable mortgage in fee or for any less estate, and also any money secured or charged on land by a trust, or by judgment, decree, or order of any superior court of law or equity, and also any legacy, portion, lien, or other charge whereby a gross sum of money is secured to be paid, and also any annual or periodical charge which by the instrument creating the same, or by any other instrument, is made repurchaseable on payment of a gross sum of money, and also any arrear remaining unpaid of any annual or periodical charge, for payment of which arrear a sale of any land charged therewith might be decreed by a court of equity.

MERCHANT SHIPPING ACT AMENDMENT ACT.

25 & 26 VICT. CAP. 63.

An Act to amend "The Merchant Shipping Act, 1854," "The Merchant Shipping Act Amendment Act, 1855," and "The Customs Consolidation Act, 1853."—[29th July, 1862.]

16. Any person appointed to any office or service by or under any local marine board shall be deemed to be a clerk or servant within the meaning of the sixty-eighth section of the act of the twenty-fifth year of the reign of Her present Majesty, chapter ninety-six : Punishment for embezzlement in shipping offices.

If any such person fraudulently applies or disposes of any chattel, money, or valuable security received by him whilst employed in such office or service for or on account of any such local marine board, or for or on account of any other public board or department, to his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him, or fraudulently withholds, retains, or keeps back the same or any part thereof contrary to any lawful directions or instructions which he is required to obey in relation to such office or service, he shall be deemed guilty of embezzlement within the meaning of the said section :

Any such person shall, on conviction of such offence as aforesaid, be liable to the same pains and penalties as are thereby imposed upon any clerk or servant for embezzlement :

In any indictment against such person for such offence it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the board by which he was appointed, or of the board or department for or on account of which he may have received the same; and no greater particularity in the description of the property shall be required in such indictment in order to sustain the same, or in proof of the offence alleged, than is required in respect of an indictment or the subject matter thereof by the seventy-first section of the said last-mentioned act.

66. The following terms used in the sections of this act hereinafter contained shall have the respective meanings hereby assigned to them, if not inconsistent with the context or subject matter ; that is to say, Interpretation of terms.

The word "report" shall mean the report required by the customs laws to be made by the master of any importing ship : "Report."

The word "entry" shall mean the entry required by the customs laws to be made for the landing or discharge of goods from an importing ship : "Entry."

The word "goods" shall include every description of wares and merchandise : "Goods."

The word "wharf" shall include all wharves, quays, docks, and premises in or upon which any goods when landed from ships may be lawfully placed : "Wharf."

25 & 26 Vict. c. 63. <i>Merchant Shipping Act Amendment Act.</i>	The word "warehouse" shall include all warehouses, buildings, and premises in which goods when landed from ships may be lawfully placed :
	The expression "wharf owner" shall mean the occupier of any wharf as hereinbefore defined :
	The expression "warehouse owner" shall mean the occupier of any warehouse, as hereinbefore defined :
"Warehouse."	
"Wharf owner."	The word "shipowner" shall include the master of the ship and every other person authorized to act as agent for the owner, or entitled to receive the freight, demurrage, or other charges payable in respect of such ship :
"Warehouse owner."	
"Shipowner."	The expression "owner of goods" shall include every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of a lien, if any, to such lien.
"Owner of goods."	

NAVAL AND VICTUALLING STORES ACT.

25 & 26 VICT. CAP. 64.

An Act for the Better Protection of Her Majesty's Naval and Victualling Stores.—[29th July, 1862.]

WHEREAS the existing enactments for the protection of Her Majesty's naval and victualling stores are numerous and complicated, and difficulties have arisen in their application, and it is consequently expedient to reduce into one act and simplify and amend them.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

Short title.	1. This Act may be cited as "The Naval and Victualling Stores Act, 1862."
Extent of act.	2. This Act shall not extend to Scotland or Ireland.
	3. In this Act—
Interpretation of terms.	The term "the Admiralty" shall be taken to mean the Lord High Admiral of the United Kingdom for the time being, or the commissioners for the time being for executing the office of Lord High Admiral :
17 & 18 Vict. c. 104.	The term "dealer in marine stores" shall be taken to mean a person bound to conform to the regulations of the Merchant Shipping Act, 1854, section four hundred and eighty :
24 & 25 Vict. c. 110.	The term "dealer in old metals" shall be taken to mean a person answering the description of such a dealer contained in "The Old Metal Dealers Act, 1861" :

The term "Her Majesty's yards" shall be taken to mean Her Majesty's dock yards, Her Majesty's victualling yards, and Her Majesty's steam factory yards :

The term "constable of the metropolitan force" shall be taken to mean a constable belonging to that force, and being by virtue of the act of the session of the twenty-third and twenty-fourth years of Her Majesty (chapter one hundred and thirty-five), "for the employment of the metropolitan police force in Her Majesty's yards and military stations," employed and authorised to act in any of Her Majesty's yards and within the limits in that act mentioned.

25 & 26 Vict.
c. 64.

Naval and Victualling Stores Act.

23 & 24 Vict.
c. 135.

4. The enactments described in Schedule (A.) to this Act are hereby repealed to the extent therein specified, and only as to Her Majesty's naval and victualling stores; but this repeal shall not extend to Scotland or Ireland, or affect—

Enactments in Schedule (A.) to this act, as to naval and victualling stores, repealed, but not as to Scotland or Ireland.

- (1.) The past operation of any such enactment;
- (2.) Any act done or any right or liability already acquired, accrued, or now existing under or by virtue of any such enactment;
- (3.) Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence already committed; or
- (4.) The institution or prosecution of any legal proceeding or any other remedy for the ascertaining, enforcing, or recovering of any such liability, penalty, forfeiture, or punishment.

I.—MARKED STORES.

Imitation of Marks.

5. The marks mentioned in Schedule (B.) to this Act may be applied in or on Her Majesty's naval and victualling stores to denote Her Majesty's property in stores so marked. It shall be lawful for the Admiralty, their contractors, officers, and workmen, and for no other person, to apply the said marks or any of them in or on naval or victualling stores. If any person apply any of the said marks in or on naval or victualling stores contrary to this provision he shall be guilty of a misdemeanor, and shall be liable to imprisonment for not more than one year, with or without hard labour.

Marks in Schedule (B.) to this act appropriated for Her Majesty's use in or on naval and victualling stores.
Imitation of marks a misdemeanor.

Defacing of Marks.

6. If any person, with intent to conceal Her Majesty's property in any naval or victualling stores, take out, destroy, or obliterate, wholly or in part, any such mark in or on any such stores, he shall be guilty of felony, and shall be liable to imprisonment for not more than two years, with or without hard labour.

Obliteration of marks, with intent to conceal Her Majesty's property in stores, felony.

Receiving, &c., of Marked Stores.

7. If any person receive, possess, keep, sell, or deliver any naval or victualling stores marked as aforesaid, knowing them to be so marked, he shall be guilty of a misdemeanor, and shall be liable to imprisonment for not more than one year, with or without hard labour.

Knowingly receiving, &c., marked stores, a misdemeanor.

8. Where the person charged with such a misdemeanor is a dealer in marine stores or in old metals, or a person employed in any of Her

Knowledge of stores being marked pre-

25 & 26 Vict.
c. 64.

*Naval and Vic-
tualling Stores
Act.*

sumed against
dealers or per-
sons employed
in yards, but to
be proved in
other cases.

No conviction
where proof that
stores were law-
fully come by.

Summary trial
of receivers, &c.
in certain cases,
under Criminal
Justice Act,
18 & 19 Vict.
c. 126.

Majesty's yards, knowledge on his part that the stores to which the charge relates were at the time of the commission of the offence marked as aforesaid shall be presumed, until the contrary is shown; in other cases evidence of such knowledge shall be necessary to support the charge.

9. Provided always, that no person shall be liable to be convicted of such a misdemeanor who shows (whether such knowledge as aforesaid is presumed or proved against him or not) that he came by the stores to which the charge relates lawfully, and without reasonable cause for believing that the person (if any) through whom he came by the same had not come by the same lawfully.

10. The provisions of the Act of the session of the eighteenth and nineteenth years of Her Majesty (chapter one hundred and twenty-six) "for diminishing Expense and Delay in the Administration of Criminal Justice in certain Cases," shall apply in the case of a person charged with such a misdemeanor in manner following:

- (1.) Where, in the judgment of the justices at such petty sessions as in that act mentioned, the value of the stores to which the charge relates does not exceed one pound, section one of that act, with all provisions relative thereto, shall apply:
- (2.) Where, in the judgment of such justices, such value exceeds one pound, section three of that act, with all provisions relative thereto, shall apply.

II.—STORES MARKED OR UNMARKED.

Creeping, sweeping, or dredging.

No unauthor-
ised person to
creep, sweep, or
dredge for stores
within 100
yards of dock-
yards, &c.

11. It shall not be lawful for any person (except a person in Her Majesty's service or in the employment of the admiralty, or a constable of the metropolitan police force), without permission in writing given by the admiralty or by some person authorised by the admiralty in that behalf, to creep, sweep, or dredge for stores lost or supposed to be lost in the sea or any tidal water within the distance of one hundred yards from any vessel belonging to Her Majesty or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any moorings belonging to Her Majesty, or from any of Her Majesty's yards. If any person creep, sweep, or dredge for stores contrary to this provision he shall be liable, on summary conviction, to a penalty of not more than five pounds.

Arrest of Offenders, Vessels, &c.

Policemen of
metropolitan
force may stop
suspected per-
sons, &c.

12. A constable of the metropolitan police force may, within the yard and limits for which he is sworn, stop, search, and detain any vessel, boat, or carriage in or on which there is reason to suspect that any of Her Majesty's naval or victualling stores, stolen or unlawfully obtained, may be found, or any person reasonably suspected of having or conveying any such stores stolen or unlawfully obtained.

Power of jus-
tices at petty
sessions in
relation to stores
stolen or unlaw-
fully obtained,
&c.

13. If any person be brought before two or more justices at petty sessions charged with having or conveying any of Her Majesty's naval or victualling stores stolen or unlawfully obtained, or reasonably suspected to have been stolen or unlawfully obtained, the following provisions shall take effect and apply:—

- (1.) If such person do not give an account to the satisfaction of the justices how he came by such stores he shall be deemed guilty of a misdemeanor, and, on summary conviction thereof before two or more justices at petty sessions, shall be liable to a penalty of not more than five pounds, or to imprisonment for not more than two months, with or without hard labour : 25 & 26 Vict.
c. 64.
*Naval
and Victualling
Stores Act.*
- (2.) If he declare that he received such stores from some other person, or that he was employed as a carrier, agent, or servant to convey the same for some other person, two or more justices at petty sessions may cause every such other person, and every former or pretended purchaser or other person through whose possession the same have or are declared to have passed, to be brought before them and examined, and may examine witnesses on oath touching the same :
- (3.) If it appear to two or more justices at petty sessions that any person has had possession of such stores (for which purpose the possession of a carrier, agent, or servant shall be deemed to be the possession of his employer), and had reasonable cause for believing that the same had been stolen or unlawfully obtained, such person shall be deemed to have had possession thereof at the time and place when and where they were found or seized, and to be guilty of a misdemeanor, and, on conviction thereof before two or more justices at petty sessions, shall be liable to a penalty of not more than five pounds, or to imprisonment for not more than three months, with or without hard labour.

Searches under Warrants.

14. Where information on oath is given to a justice of the peace that there is reasonable cause to believe, and that the informant believes, that some of Her Majesty's naval or victualling stores, marked as aforesaid, or (whether marked or not) stolen or unlawfully obtained, are in a house or place within the jurisdiction of such justice, he may issue a search warrant to a constable. Search warrant
on information
on oath.

15. Every such search warrant shall be a sufficient authority for the constable to whom the same is directed to enter, in the daytime, or by night, if power for that purpose be given by the warrant, with such assistance as may be found necessary, into such house or place, and there to search for such naval or victualling stores, and if upon such search any such naval or victualling stores be found, then to seize the same, and either to convey the same before a justice of the peace, or to guard them on the spot, or otherwise dispose of them in a place of safety, until further proceedings can be taken in relation thereto. Effect of search
warrant.

16. Where under any such search warrant any naval or victualling stores, appearing or reasonably suspected to belong or to have belonged to Her Majesty, are found in the possession or keeping of a dealer in marine stores or in old metals, or of a person employed in any of Her Majesty's yards, and such dealer or person does not prove that he came by the same lawfully, and without reasonable cause for believing that the person (if any) through whom he came by the same had not come by the same lawfully, such dealer or person, on summary conviction before two or more justices at petty sessions, shall be liable for the first offence to a penalty of not more than five pounds, and for a second or other subsequent offence to a penalty of not more than twenty pounds, or imprisonment for not more than three months, with hard labour. Dealers in
marine stores
and in old
metals to
account for pos-
session of stores
found on search.

25 & 26 Vict.
c. 64.

III.—GENERAL PROVISIONS.

Procedure.

*Naval
and Victualling
Stores Act.*

Parts of
24 & 25 Vict.
c. 96 (Larceny)
incorporated.

Criminal pos-
session.

Saving for
indictment.

Admiralty alone
to prosecute.

Penalties, &c.,
to be applied
under orders of
Admiralty.

Effect of con-
viction of dealers
in old metals
under this act.

Incorporation
of provisions of
Metropolitan
Police Force
Acts.

17. Subject and without prejudice to the application by this act of the said act of the session of the eighteenth and nineteenth years of Her Majesty, and to the other express provisions of this act, such of the provisions of the act of the last session of Parliament (chapter ninety-six), "to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences," as are mentioned in schedule (C.) to this act, shall be incorporated with this act, and shall for the purposes of this act be read as if they were here re-enacted.

18. For the purposes of this act naval or victualling stores shall be deemed to be in the possession or keeping of any person, if he have them in his personal possession or keeping, or if he knowingly and wilfully have them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or inclosed, whether occupied by himself or not, and whether the same be so had for his own use or for the use or benefit of another.

19. Nothing in this act shall be taken to prevent any person from being indicted for any indictable offence made punishable on summary conviction by this act, or to prevent any person from being liable under any other act, or otherwise, to any other or higher penalty or punishment than is provided for any offence by this act, but so that no person be punished twice for the same offence.

20. It shall not be competent for any person, other than the admiralty, their officers, solicitors, or agents, to institute or carry on under this act any prosecution by way of summary proceeding or otherwise for any offence by this act made felony or misdemeanor or made punishable on summary conviction.

Application of pecuniary Penalties.

21. Notwithstanding anything in any act relating to municipal corporations or to the metropolitan police force or in any other act contained, any pecuniary penalty or other monies recovered under this act shall be paid or applied as the admiralty shall direct.

Dealers in Old Metals.

22. Every conviction under this act of a dealer in old metals shall for the purposes of registration and its consequences under The Old Metal Dealers Act, 1861, be equivalent to a conviction under that act.

Metropolitan Police.

23. Subject and without prejudice to the express provisions of this act, all enactments relative to the powers, duties, privileges, and responsibilities of the metropolitan police force when acting within the metropolitan police district shall, in relation to offences and other matters connected with naval and victualling stores belonging to Her Majesty, or appearing or reasonably suspected to belong or to have belonged to Her Majesty, extend and apply to constables of the metropolitan force when acting within the yards and limits for which they are sworn, and such enactments shall for the purposes of this act be read as if they were here re-enacted.

APPENDIX.

xxvii

SCHEDULES.

25 & 26 Vict.
c. 46.

SCHEDULE (A.)

ENACTMENTS REPEALED as to H^RE MAJESTY'S NAVAL and VICTUALLING STORES,
except as to SCOTLAND and IRELAND.

*Naval
and Victualling
Stores Act.*

Schedules.

Session and Chapter.	Title	Extent of Repeal
9 & 10 Will. 3, c. 41.	An act for the better preventing the embezzlement of His Majesty's stores of war, and preventing cheats, frauds, and abuses, in paying seamen's wages.	Sections one, two, four, five, and eight.
9 Geo. 1, c. 8.	An act for continuing some laws, and reviving others therein mentioned, for exempting apothecaries from serving parish and ward offices, and upon juries; and relating to jurors; and to the payment of seamen's wages, and the preservation of naval stores, and stores of war; and concerning the militia and trophy money; and against clandestine running of uncustomed goods, and for more effectual preventing frauds relating to the customs, and frauds in mixing silk with stuffs to be exported.	Sections three, four, and five.
17 Geo. 2, c. 40.	An act to continue the several laws therein mentioned for preventing theft and rapine on the northern borders of England; for the more effectual punishing wicked and evil-disposed persons going armed in disguise, and doing injuries and violences to the persons and properties of His Majesty's subjects, and for the more speedy bringing the offenders to justice; for continuing two clauses to prevent the cutting or breaking down the bank of any river, or sea bank, and to prevent the malicious cutting of hop-binds; and for the more effectual punishment of persons maliciously setting on fire any mine, pit, or delph of coal, or cannel coal; and of persons unlawfully hunting or taking any red or fallow deer in forests or chaces, or beating or wounding the keepers or other officers in forests, chaces, or parks; and for granting a liberty to carry sugars of the growth, produce, or manufacture of any of His Majesty's sugar colonies in America, from the said colonies directly to foreign parts in ships built in Great Britain, and navigated according to law; and to explain two acts relating to the prosecution of offenders for embezzling naval stores, or stores of war; and to prevent the retailing of wine within either of the Universities in that part of Great Britain called England without licence.	Section ten.
39 & 40 Geo. 3, c. 89.	An act for the better preventing the embezzlement of His Majesty's naval, ordnance, and victualling stores.	The whole.
34 Geo. 3, c. 60.	An act for the better preventing the embezzlement of His Majesty's cordage.	The whole.

25 & 26 Vict.
c. 64.SCHEDULE (A.)—*continued*.

<i>Naval and Victualling Stores Act.</i> Schedules.	Session and Chapter.	Title.	Extent of Repeal.
	54 Geo. 3, c. 159.	An act for the better regulation of the several ports, harbours, roadsteads, sounds, channels, bays, and navigable rivers in the United Kingdom; and of His Majesty's docks, dock yards, arsenals, wharfs, moorings, and stores therein; and for repealing several acts passed for that purpose.	Section ten.
	55 Geo. 3, c. 127.	An act to repeal an act of the fifty-third year of His present Majesty, for preventing the embezzlement of stores; and to extend the provisions of the several acts relating to His Majesty's naval, ordnance, and victualling stores to all other public stores.	The whole.
	56 Geo. 3, c. 80.	An act to enable the principal officers and commissioners of His Majesty's navy resident on foreign stations to grant certificates of stores or goods which may be sold by such officers or commissioners at such foreign stations.	The whole.
	4 Geo. 4, c. 53.	An act for extending the benefit of clergy to several larcenies therein mentioned.	The whole.
	2 & 3 Will. 4, c. 40.	An act to amend the laws relating to the business of the civil departments of the navy, and to make other regulations for more effectually carrying on the duties of the said departments.	Section thirty-four.

SCHEDULE (B.)

MARKS appropriated for Her Majesty's use in or on Naval and Victualling Stores.

Stores.	Marks.
(1.) Hempen cordage and wire rope	Coloured worsted threads laid up with the yarns and the wire respectively.
(2.) Canvas, fearnought, hammocks, and seamen's bags... ..	A blue line in a serpentine form.
(3.) Buntin	A double tape in the warp.
(4.) Candles... ..	A blue cotton thread in each wick.
(5.) Timber, metal, and other naval or victualling stores not before enumerated .	The broad arrow.

SCHEDULE (C.)

PARTS of the Larceny Act of 1861 incorporated with this act.

Sections 99, 100, 103, 105, 107 to 113, both inclusive, and 115 to 121, both inclusive.

JURISDICTION IN HOMICIDES ACT.

25 & 26 VICT. CAP. 65.

An Act for the more speedy Trial of certain Homicides committed by persons subject to the Mutiny Act.—[29th July, 1862.]

WHEREAS it is expedient that persons subject to the present or any future Mutiny Act who shall be guilty of the murder or manslaughter of any person subject to the said act or acts should be brought to speedy punishment, and that the offences of such persons should in certain cases be inquired of and tried with all convenient speed, and that the inquiry, trial, and punishment should in certain cases be more speedy than the usual course of practice in respect of the times of issuing Her Majesty's commissions of oyer and terminer or gaol delivery will allow : And whereas it would contribute to the more speedy punishment of persons guilty thereof, and to the maintenance of good order and military discipline, if, when charged with murder or manslaughter committed in England or Wales, and out of the jurisdiction of the Central Criminal Court, such persons were rendered liable to be indicted and tried at the Central Criminal Court, and if when charged with murder or manslaughter committed in Ireland and elsewhere than in the county of the city of Dublin or the county of Dublin such persons were rendered liable to be indicted and tried before and by the commissioners appointed by virtue of any commission of oyer and terminer or of gaol delivery under the great seal of Ireland for the county of the city of Dublin : Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Whenever any person shall have been committed for any murder or manslaughter committed or supposed to have been committed at any place in England or Wales, and out of the jurisdiction of the Central Criminal Court, or at any place in Ireland other than the county of the city of Dublin or the county of Dublin, and it shall appear to Her Majesty's Court of Queen's Bench in that part of the United Kingdom wherein the said offence was committed or supposed to have been committed, in term time, or to any judge thereof, or of any of Her Majesty's superior courts of common law in the same part of the United Kingdom, in vacation, that the said person (hereinafter called the prisoner) was at the time of the commission or supposed commission of the said murder or manslaughter subject to the present or any future Mutiny Act, and that the person (hereinafter called the deceased) for the murder or manslaughter of whom the prisoner shall have been committed was at the time last aforesaid subject to the said act or acts, it shall be lawful for such Court of Queen's Bench in term time, or for such judge in vacation,

The Queen's Bench or a judge may order certain prisoners to be indicted and tried under the provisions of this act.

25 & 26 Vict.
c. 65.

*Jurisdiction in
Homicides Act.*

without the prisoner being brought or appearing in person before the said court or judge, upon the application of Her Majesty's principal Secretary of State for the War Department, and upon his certificate in writing, in the form numbered 1, in the schedule to this act annexed, or to the like effect, duly signed, that it would contribute to the maintenance of good order and military discipline if the said prisoner were to be indicted and tried under the provisions of this act, to order that the said prisoner shall be indicted and tried under the provisions of this act, and such order may be in one of the forms numbered 2, in the schedule to this act annexed, or to the like effect.

And upon such order the prisoner shall be removed to the gaol of Newgate in London or the Richmond Bridewell in Dublin, and the depositions, &c. returned to the court at which the prisoner is to be indicted.

2. Whenever any such order shall have been made, the gaoler or keeper of any gaol or house of correction in which the said prisoner shall be confined shall forthwith upon the delivery to him of an office copy of such order, without writ of *habeas corpus* or other writ for that purpose, cause such prisoner, with his commitment and detainer, to be safely removed to Her Majesty's gaol of Newgate in the city of London if the said prisoner shall be confined in England or Wales, and to Her Majesty's gaol called the Richmond Bridewell in the county of the city of Dublin if the said prisoner shall be confined in Ireland, and thereupon the keeper of such gaol shall receive such prisoner into his custody in such gaol, there to remain until he shall be delivered by due course of law; and the justice or coroner by whom the prisoner was committed, or any other person having the custody or possession thereof, shall forthwith upon the delivery to him of an office copy of such order transmit any recognizances, depositions, examinations, or informations relating to the murder or manslaughter mentioned in such order which shall be in his custody or possession to the proper officer of the court at and before which the prisoner shall be rendered liable to be indicted under the provisions of this act, to be by him kept among the records of the court.

A prisoner removed may be indicted and tried in London or Dublin.

3. Whenever any prisoner shall have been removed to the said gaol of Newgate in the city of London under the provisions of this act, the murder or manslaughter of the deceased by the prisoner may be inquired of, heard, and determined, and the prisoner may be indicted, arraigned, tried, and convicted for the murder or manslaughter of the deceased, in the same manner in all respects as if such murder or manslaughter had been committed within the jurisdiction of the Central Criminal Court; and whenever any prisoner shall have been removed to the Richmond Bridewell in the county of the city of Dublin under the provisions of this act, the murder or manslaughter of the deceased by the prisoner may be inquired of, heard, and determined, and the prisoner may be indicted, arraigned, tried, and convicted for the murder or manslaughter of the deceased, in the same manner in all respects as if such murder or manslaughter had been committed in the county of the city of Dublin.

A certificate of his removal under this act and of the cause of his committal shall be endorsed on the indictment.

4. Whenever any prisoner so removed to one of the said gaols shall be indicted under the provisions of this act, an office copy of the before-mentioned order of the Court of Queen's Bench, or of a judge, shall be delivered to the proper officer of the court at and before which the prisoner shall be rendered liable to be indicted under the provisions of this act, and such officer shall thereupon, by endorsement on the back of the bill of indictment, before its presentment by the grand jury, or by direction of the justices, judges, or commissioners of the court before whom such indictment shall be tried, or any two or more of them, at any other time, certify that the prisoner was committed for the murder or man-

slaughter of the deceased, and was removed to the gaol of Newgate or the Richmond Bridewell, as the case may be, under the provisions of this act; and such endorsement, which may be in the form numbered 3, in the schedule to this act annexed, or to the like effect, and which may be amended by the said last-mentioned justices, judges, or commissioners, or any two or more of them, at any time, and in such manner, and as often as to them shall seem fit, shall be conclusive proof that the said prisoner was committed for the murder or manslaughter of the deceased, and was removed to the said gaol of Newgate or the said Richmond Bridewell under the provisions of this act; and such indorsement shall not constitute or be deemed or taken to be a portion of the indictment.

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5. Whenever any indictment found under the provisions of this act shall be amended in any manner, the before-mentioned indorsement thereon shall, if it be necessary, be amended in the like manner.

When indictment is amended the indorsement is to be also amended.

6. A prisoner committed for murder may be indicted under the provisions of this act for manslaughter, and a prisoner committed for manslaughter may be indicted under the same provisions for murder.

Indictment need not follow the commitment.

7. It shall not be lawful for any person, either by himself or his counsel, to take any objection, either in the court at, before, or by which the prisoner shall be indicted, arraigned, tried, convicted, or sentenced under the provisions of this act, or in any court of error, to any order of the said Court of Queen's Bench or of any judge, or to any other proceeding under or by virtue of which the prisoner shall have been removed to the gaol of Newgate or the Richmond Bridewell; and the form of the indictment under the provisions of this act shall be the same as that of indictments for murder or manslaughter committed within the jurisdiction of the court at and before which such prisoner shall be indicted under the provisions of this act; and it shall not be necessary to prove on the trial of the prisoner that either the prisoner or the deceased was or were at the time of the commission or supposed commission of the said murder or manslaughter subject to the provisions of any mutiny act; and the prisoner shall not be acquitted by reason only of its appearing that the prisoner or the deceased was not or were not at the time last aforesaid subject to the provisions of any mutiny act.

No objection to be taken to any order, and no proof to be required of the subject of any person to the Mutiny Act.

8. When any person shall have been convicted of any offence upon the trial of any indictment found under the provisions of this act, it shall be lawful for the justices, judges, or commissioners of the court before which any such conviction shall have taken place, or for any two or more of them, or, in case sentence shall not then be passed, for the justices, judges, or commissioners of the said court, or for any two or more of them, at any subsequent sessions of the said court, to order and adjudge such convict to be punished according to law at any place either within the jurisdiction of the said court, or within the county or place where such offence shall have been committed or supposed to have been committed; and in cases where such justices, judges, or commissioners, or any two or more of them, shall order such convict to be punished in such county or place, it shall be lawful for such justices, judges, or commissioners, or any two or more of them, after passing sentence upon such convict, to make an order commanding the keeper of the gaol of Newgate or of the Richmond Bridewell to cause such convict to be delivered into the custody of the gaoler or keeper of the gaol or house of correction in such county or place, together with such order, and commanding such

Any person convicted may be sentenced to be punished either in the county where the offence was committed or within the jurisdiction of the court by which he shall be tried.

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gaoler or keeper to receive such convict into his custody in such gaol or house of correction, and him there safely to keep until such sentence shall have been executed upon such convict according to law, or until he shall be otherwise delivered by due course of law, and also to make an order commanding the sheriff of such county or place to execute such sentence upon such convict within such county or place according to law in the same manner as if he had been tried and received such sentence in such county or place ; and every such sheriff, gaoler, and keeper respectively is hereby commanded to perform and execute according to law each and everything which he shall be commanded to perform and execute by any such order ; and the several forms in the schedule to the act made and passed in the nineteenth year of Queen Victoria, intituled *An Act to empower the Court of Queen's Bench to order certain Offenders to be tried at the Central Criminal Court*, contained, or forms to the like effect, shall be deemed good, valid, and sufficient in law, and in the case of any order directed to any sheriff, and commanding him to execute any sentence, it shall be sufficient to deliver such order either to such sheriff or to his under sheriff.

On notice given
by prosecutor,
recognizances
to bind parties
to give evidence
at the inquiry
and trial.

9. Every recognizance which shall have been entered into for the prosecution of the prisoner, and every recognizance of any witness to give evidence against him for his said offence, shall, in case any such order shall be made as is mentioned in the first section of this act, be obligatory on each of the parties bound by such recognizance to prosecute and give evidence, and to do all other things mentioned with reference to the said inquiry and trial at the court at or before which the prisoner shall be indicted or tried under the provisions of this act, in like manner as if such recognizance had been originally entered into for prosecuting such offence, or giving evidence, or doing other things before the said last-mentioned court ; provided that notice in writing shall have been given either personally, or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the said last-mentioned court upon the inquiry into and trial of the said offence ; and the prosecutor is hereby required, on notice given to him that such order as is mentioned in the first section of this act has been made, to give such notice or notices in writing as are in this section mentioned.

Power to com-
pel witnesses to
attend trials.

10. Whenever any indictment shall have been found at any court under the provisions of this act, it shall be lawful for the said court to issue process to compel the attendance of witnesses, as well on the part of the prosecution as on the part of the defence, on the trial of such indictment, in like manner as in cases of indictments found at the said court for offences committed within the jurisdiction of the said court ; and every such process shall and may be lawfully executed at any place in that part of the United Kingdom wherein the gaol to which the prisoner shall have been removed under the provisions of this act shall be situate.

Expenses of
prosecution and
rewards may
be ordered to
be paid.

11. Whenever any indictment shall have been found at any court under the provisions of this act, it shall be lawful for the said court to order such expenses of the prosecutor and witnesses, and such other expenses, and such of the several rewards payable in pursuance of any statute made or to be made as to such court may seem reasonable and sufficient, to be paid forthwith by the proper officer of the said court, and such moneys shall be repaid to the said officer by the same persons

who would have been liable to pay the same, as if such court were holden under commissions of oyer and terminer and gaol delivery for the county or place in which the prisoner was committed. 25 & 26 Vict. c. 65.

12. Whenever any prisoner shall be tried at any court under the provisions of this act, it shall be lawful for the justices, judges, or commissioners of the said court before whom any such prisoner shall be tried, or for any two or more of them, if it shall seem reasonable so to do, to order the payment of the expenses of the witnesses on the part of the defence, and such payment shall be made accordingly in the same manner in all respects as if such witnesses were witnesses on the part of the prosecution; and the Commissioners of Her Majesty's Treasury shall, upon receipt of such last-mentioned order, and out of any moneys provided by Parliament for law charges in England or Ireland, as the case may be, repay such sum or sums as shall be therein specified to the person who shall have paid the same. *Jurisdiction in Homicides Act.* Power to order payment of expenses of prisoner's witnesses.

13. Whenever any such order shall have been made as is mentioned in the first section of this act, it shall not be necessary for any purpose whatsoever to prove that the prisoner has been duly removed to the gaol of Newgate or the Richmond Bridewell under the provisions of this act, or that he was committed for the murder or manslaughter of the deceased; and no evidence or proof to the contrary shall be admitted: And every verdict and judgment which shall be given upon any indictment tried under the provisions of this act shall be deemed as good, valid, and sufficient in law as if the offence charged in such indictment had been actually committed within the jurisdiction of the said court before which such indictment shall be tried. No proof to be required of due removal of prisoner. Verdicts and judgments to be valid.

14. Whenever any person shall have been removed into the custody of the said keeper of the said gaol of Newgate or of the Richmond Bridewell under the provisions of this act, such person shall, without writ of habeas corpus or other writ for that purpose, be removed into and from the court at or before which such indictment shall be found, tried, or proceeded upon, when and as often as it may be necessary, by the keeper of the said gaol of Newgate or of the Richmond Bridewell, with his commitment and detainer, in order that he may be tried, sentenced, or otherwise dealt with according to law; and such removal shall not be deemed an escape. The prisoner may be removed to and from the Central Criminal Court as often as necessary.

15. Whenever any indictment shall have been found under the provisions of this act, the justices, judges, or commissioners of the court at or before which such indictment shall be found, tried, or proceeded upon for the time being, or any two or more of them, shall possess the same power, jurisdiction, and authority as to all matters and things whatsoever as if the offence charged in the said indictment had actually been committed within the jurisdiction of the said court: and every such offence may be dealt with, tried, and determined by and before such justices, judges, or commissioners, or any two or more of them, in the same manner in all respects as if the same had actually been committed within the jurisdiction of the said court: Provided that nothing in this section contained shall limit or lessen any power, jurisdiction, or authority conferred upon the said justices, judges, or commissioners, or any two or more of them, by this act. Court before which indictment found to have the same authority as if the offence had been committed within its jurisdiction.

16. The provisions of the twenty-first section of the said act made and passed in the nineteenth year of Her Majesty Queen Victoria shall Sects. 21, 27 & 28 of 19 VOL. IX. e

- 25 & 26 Vict.
c. 65.
*Jurisdiction in
Homicides Act.*
—
Vict. c. 16,
extended to
this act.
- apply to every prisoner removed to any gaol under the provisions of this act, in the same manner in all respects and for all intents and purposes as if such prisoner had been so removed as in any of the preceding sections of the said act is mentioned, and as if that section had been re-enacted herein with reference to prisoners removed to any gaol under the provisions of this act; and where any person shall have been removed to any gaol under the provisions of this act, the provisions of the twenty-seventh and twenty-eighth sections of the same act shall apply in the same manner in all respects as in the case where any person shall have been removed or committed to the said gaol of Newgate under the provisions of the said act.
- Prosecutor and witnesses may be bound by recognizances to appear again before the said court.
17. Whenever any prosecutor and witnesses in any case where any indictment shall have been found under the provisions of this act shall appear before the court at or before which such indictment shall be found, tried, or proceeded upon, it shall be lawful for such court, from time to time and as often as to the same court shall seem fit, to require such prosecutor and witnesses to enter into such recognizance in such sum of money, and with such condition as to appearance at the said court, and otherwise, as to the said court shall seem fit.
- Her Majesty in council may make rules for purposes of this act.
18. It shall be lawful for Her Majesty, by and with the advice of her most honourable Privy Council, from time to time to make rules and regulations touching the said gaol of Newgate, or any other gaol or prison, and the government and keeping thereof; and it shall be lawful for the Lord Lieutenant or other chief governor or governors of Ireland, by and with the advice of the Privy Council, from time to time to make rules and regulations touching the said Richmond Bridewell for the purposes of this act, and touching the alteration of any commission, writs, precepts, or other proceedings whatsoever for carrying into effect the purposes of this act; and all such rules and regulations shall be of the like force and effect as if the same had been made by authority of Parliament, and shall be notified in the London or Dublin Gazette, or in such other manner as Her Majesty, by and with the advice of her most honourable Privy Council, shall think fit to direct.
- Act not to affect any peer.
19. Nothing in this act contained shall render any person claiming the privilege of peerage triable under the provisions of this act.
- Interpretation of terms.
20. In the construction of this act the words "present Mutiny Act" shall be understood to mean the act made and passed in this present Parliament, intituled *An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their quarters*; and the words "future Mutiny Act" shall be understood to mean any act hereafter to be made and passed for the purposes and with the intents and objects of the present Mutiny Act, or for the like purposes, and with the like intents and objects.
- Short title.
21. In citing this act in any instrument, document, or proceeding it shall be sufficient to use the expression "The Jurisdiction in Homicides Act, 1862."

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c. 65.*Jurisdiction in
Homicides Act.*

Schedule.

SCHEDULE referred to in the foregoing Act.

1. *Form of Certificate mentioned in the First Section.*

I, the undersigned, Her Majesty's principal Secretary of State for the War Department, having been credibly informed that [name or names of prisoner or prisoners] lately committed for the murder [or manslaughter] of [name of person killed] deceased, and now confined in the gaol [house of correction] at , in the county of , is a person [are persons] subject to the Mutiny Act, and that the said [name of person deceased] deceased was at the time of the alleged murder [or manslaughter] also subject to the said act, and that the said murder or supposed murder [or manslaughter or supposed manslaughter] was committed in England or Wales, and out of the jurisdiction of the Central Criminal Court [or in Ireland and elsewhere than in the county of the city of Dublin, in the county of Dublin,] and having been credibly informed of the circumstances relating to the said alleged crime, and deeming it expedient that a more speedy trial of the said [name or names of prisoner or prisoners] should be had than the usual course of practice allows, do hereby certify my belief that it would contribute to the maintenance of good order and military discipline if the said [name or names of prisoner or prisoners] were to be indicted and tried under the provisions of the Jurisdiction in Homicides Act, 1862.

Given under my hand this day of , A.D.

[Signature of the said Secretary of State.]

2. *Form of Order of the Court of Queen's Bench mentioned in the First Section.*

In Her Majesty's Court of Queen's Bench. [Name of term.]
Term, A.D. [Year of Our Lord.]

Whereas it appears by the affidavit [or affidavits] of [name or names of deponent or deponents], that [name or names of prisoner or prisoners], now in the custody of the gaoler or keeper of the gaol [or house of correction] at , in the county of , was [or were] committed for the murder [or manslaughter] of [name of deceased] deceased, and that as well the said [name or names of prisoner or prisoners] as the said [name of deceased] deceased were at the time of the commission or supposed commission of the said murder [or manslaughter] subject to the Mutiny Act : Now thereupon, and on the application and certificate of Her Majesty's principal Secretary of State for the War Department, it is ordered, that the said [name or names of prisoner or prisoners] be indicted and tried under the provisions of the Jurisdiction in Homicides Act, 1862.

By the Court.

25 & 26 Vict.
c. 65.

2. *Form of Order of a Judge mentioned in the First Section.*

Whereas it appears [follow the last preceding form as far as the words
Jurisdiction in "Secretary of State for the War Department"], I do order that the said
Homicides Act. [name or names of prisoner or prisoners] be indicted and tried under the
Schedule. provisions of the Jurisdiction in Homicides Act, 1862.

Given under my hand in vacation, this day of . A.D.
[Year of Our Lord].

[Signature of judge.]

3. *Form of Indorsement mentioned in the Fourth Section.*

I certify that [name or names of prisoner or prisoners] was [or were]
committed for the murder [or manslaughter] of [name of deceased]
deceased, and that he [or they] has [or have] been removed to the gaol
of Newgate [or the Richmond Bridewell] under the provisions of the
Jurisdiction in Homicides Act, 1862.

[Signature of proper officer of the court.]

DECLARATION OF TITLE ACT.

25 & 26 VICT. CAP. 67.

An Act for obtaining a Declaration of Title.—[29th July, 1862.]

Penalty on
making false
statement and
suppression of
deeds and evi-
dence.

44. If in the course of any proceeding before the court under this
act any person acting either as principal or agent shall, knowingly and
with intent to deceive, make or assist or join in or be privy to the making
of any material false statement or representation, or suppress, conceal,
or assist or join in or be privy to the suppressing, withholding, or
concealing from the court any material document, fact, or matter of infor-
mation, every person so acting shall be deemed to be guilty of a misdeme-
anor and on conviction shall be liable to be imprisoned for a term not ex-
ceeding three years, and either with or without hard labour, or to be
fined such sum as the court by which he is convicted shall award: the
title or declaration of title obtained by means of such fraud or falsehood
shall be null and void for or against all persons other than a purchaser
in good faith for valuable consideration without notice.

Penalty on
fraudulent
alterations, &c.

45. If in the course of any proceeding before the court under this
act any person shall fraudulently forge or alter or assist in forging or
any certificate or other document relating to such land or to the
title thereof, or shall fraudulently offer, utter, dispose of, or put off

25 & 26 Vict.
c. 88.

*Merchandise
Marks Act.*

Majesty or not, or some of such persons subjects of Her Majesty and some of them not, and whether such body corporate, body of the like nature, company, association, or society be established or carry on business within Her Majesty's dominions or elsewhere, or partly within Her Majesty's dominions and partly elsewhere; the word "mark" shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other description; and the expression "trade mark" shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark as aforesaid lawfully used by any person to denote any chattel, or (in Scotland) any article of trade, manufacture, or merchandise, to be an article or thing of the manufacture, workmanship, production, or merchandise of such person, or to be an article or thing of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes or any of them; the word "misdemeanor" shall include crime and offence in Scotland; and the word "court" shall include any sheriff or sheriff substitute in Scotland.

Forging a trade
mark or falsely
applying any
trade mark
with intent to
defraud, a mis-
demeanor.

2. Every person who, with intent to defraud, or to enable another to defraud any person, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any trade mark, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article not being the manufacture, workmanship, production, or merchandise of any person denoted or intended to be denoted by such trade mark, or denoted or intended to be denoted by such forged or counterfeited trade mark, or not being the manufacture, workmanship, production, or merchandise of any person whose trade mark shall be so forged or counterfeited, or shall apply or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article, not being the particular or peculiar description of manufacture, workmanship, production, or merchandise denoted or intended to be denoted by such trade mark or by such forged or counterfeited trade mark, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to Her Majesty every chattel and article belonging to such person to which he shall have so unlawfully applied, or caused or procured to be applied, any such trade mark or forged or counterfeited trade mark as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark, or forged or counterfeited trade mark as aforesaid, shall have been so applied, and every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeited trade mark as aforesaid, shall be forfeited to Her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

Applying a
forged trade
mark to any
vessel, case,
wrapper, &c.

3. Every person who, with intent to defraud, or to enable another to defraud, any person, shall apply or cause or procure to be applied any trade mark or any forged or counterfeited trade mark to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other

25 & 26 Vict.
c. 88.

*Merchandise
Marks Act.*

intent to defraud
to be deemed
forgeries.

Any person
who, after 31st
December 1863,
shall have sold
an article hav-
ing a false trade
mark to be
bound to give
information
where he pro-
cured it.

Power to jus-
tices to summon
parties refusing
to give infor-
mation.

Penalty for
refusal 5l.

Marking any
false indication
of quantity, &c.
upon an article
with intent to
defraud, penalty
a sum equal to
the value of the
article and the
further sum
not exceeding
5l. and not less
than 10s.

trade mark with such alteration or addition, or shall cause such imitation of a trade mark to resemble any genuine trade mark so or in such manner as to be calculated or likely to deceive, shall be and be deemed to be a false, forged, and counterfeited trade mark within the meaning of this act; and every act of making, applying, or otherwise using any such addition to or alteration of a trade mark or any such imitation of a trade mark as aforesaid, done by any person with intent to defraud, or to enable any other person to defraud, shall be and be deemed to be forging and counterfeiting a trade mark within the meaning of this act.

6. Where any person who, at any time after the thirty-first day of December one thousand eight hundred and sixty-three, shall have sold, uttered, or exposed for sale or other purpose as aforesaid, or shall have caused or procured to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, or together with the trade mark of any other person used without lawful authority or excuse as aforesaid, and that whether any such trade mark, or such forged or counterfeited trade mark as aforesaid, be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall have been sold or exposed for sale, such person shall be bound upon demand in writing delivered to him or left for him at his last known dwelling-house or at the place of sale or exposure for sale by or on the behalf of any person whose trade mark shall have been so forged or counterfeited, or used without lawful authority or excuse as aforesaid, to give to the person requiring the same, or his attorney or agent, within forty-eight hours after such demand, full information in writing of the name and address of the person from whom he shall have purchased or obtained such chattel or article, and of the time when he obtained the same; and it shall be lawful for any justice of the peace, on information on oath of such demand and refusal, to summon before him the party refusing, and on being satisfied that such demand ought to be complied with to order such information to be given within a certain time to be appointed by him; and any such party who shall refuse or neglect to comply with such order shall for every such offence forfeit and pay to Her Majesty the sum of five pounds, and such refusal or neglect shall be *prima facie* evidence that the person so refusing or neglecting had full knowledge that the trade mark, together with which such chattel or article was sold, uttered, or exposed for sale or other purpose as aforesaid, at the time of such selling, uttering, or exposing was a forged, counterfeited, and false trade mark, or was the trade mark of a person which had been used without lawful authority or excuse, as the case may be.

7. Every person who, with intent to defraud or to enable another to defraud, shall put or cause or procure to be put upon any chattel or article, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which any chattel or article shall be intended to be or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture, or upon any case, frame, or other thing in or by means of which any chattel or article shall be intended to be or shall be exposed for sale, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or any part thereof, or of the

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c. 88.

*Merchandise
Marks Act.*

remedy which any person aggrieved by such act may be entitled to at law, in equity, or otherwise, and shall not nor shall any of them exempt or excuse any person from answering or making discovery upon examination as a witness or upon interrogatories, or otherwise, in any suit or other civil proceeding : provided always, that no evidence, statement, or discovery which any person shall be compelled to give or make shall be admissible in evidence against such person in support of any indictment for a misdemeanor at common law or otherwise, or of any proceeding under the provisions of this act.

Intent to defraud, &c. any particular person need not be alleged in an indictment, &c. or proved.

12. In every indictment, information, conviction, pleading, and proceeding against any person for any misdemeanor or other offence against the provisions of this act in which it shall be necessary to allege or mention an intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the person accused of having done any act which is hereby made a misdemeanor or other offence did such act with intent to defraud, or with intent to enable some other person to defraud, without alleging or mentioning an intent to defraud any particular person ; and on the trial of any such indictment or information for any such misdemeanor, and on the hearing of any information or charge of or for any such other offence as aforesaid, and on the trial of any action against any person to recover a penalty for any such other offence as aforesaid, it shall not be necessary to prove an intent to defraud any particular person, or an intent to enable any particular person to defraud any particular person, but it shall be sufficient to prove with respect to every such misdemeanor and offence that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

Persons who aid in the commission of a misdemeanor to be also guilty.

13. Every person who shall aid, abet, counsel, or procure the commission of any offence which is by this act made a misdemeanor shall also be guilty of a misdemeanor.

Punishment for misdemeanor under this act.

14. Every person who shall be convicted or found guilty of any offence which is by this act made a misdemeanor shall be liable, at the discretion of the court and as the court shall award, to suffer such punishment by imprisonment for not more than two years, with or without hard labour, or by fine, or both by imprisonment with or without hard labour and fine, and also by imprisonment, until the fine (if any) shall have been paid and satisfied.

Recovery of penalties.

15. In every case in which any person shall have committed or done any offence or act whereby he shall have forfeited or become liable to pay to Her Majesty any of the penalties or sums of money mentioned in the provisions of this act, every such penalty or sum of money shall or may be recovered in England, Wales, or Ireland in an action of debt, which any person may as plaintiff for and on behalf of Her Majesty commence and prosecute to judgment in any court of record, and the amount of every such penalty or sum of money to be recovered in any such action shall or may be determined by the jury (if any) sworn to try any issue in such action, and if there shall be no such jury then by the court or some other jury, as the court shall think fit, or instead of any such action being commenced such penalty or sum of money shall or may in England or Wales be recovered by a summary proceeding before two justices of the peace having jurisdiction in the county or place where the party offending shall reside or have any place of business,

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article with a
trade mark to
be deemed to
contract that
the mark is
genuine.

sell or contract to sell (whether by writing or not) to any other person any chattel or article with any trade mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

After 31st
December 1863
vendor of an
article with de-
scription upon it
of its quantity
to be deemed to
contract that
the description
was true.

20. In every case in which at any time after the thirty-first day of December one thousand eight hundred and sixty-three any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

In suits at law
or in equity
against persons
for using forged
trade marks,
court may order
article to be
destroyed, and
may award in-
junction, &c.

21. In every case in any suit at law or in equity against any person for forging or counterfeiting any trade mark, or for fraudulently applying any trade mark, to any chattel or article, or for selling, exposing for sale, or uttering any chattel or article with any trade mark falsely or wrongfully applied thereto, or with any forged or counterfeit trade mark applied thereto, or for preventing the repetition or continuance of any such wrongful act, or the committal of any similar act, in which the plaintiff shall obtain a judgment or decree against the defendant, the court shall have power to direct every such chattel and article to be destroyed or otherwise disposed of; and in every such suit in a court of law the court shall or may upon giving judgment for the plaintiff award a writ of injunction or injunctions to the defendant commanding him to forbear from committing and not by himself or otherwise to repeat or commit any offence or wrongful act of the like nature as that of which he shall or may have been convicted by such judgment, and any disobedience of any such writ of injunction or injunctions shall be punished as a contempt of court: and in every such suit at law or in equity it shall be lawful for the court or a judge thereof to make such order as such court or judge shall think fit for the inspection of every or any manufacture or process carried on by the defendant in which any such forged or counterfeit trade mark, or any such trade mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any chattel, article, and thing in the possession or power of the defendant alleged to have thereon or in any way attached thereto any forged or counterfeit trade mark, or any trade mark falsely or wrongfully applied, and

25 & 26 Vict.
c. 88.

*Merchandise
Marks Act.*

Act not to affect
the Corporation
of Cutlers of
Hallamshire,
nor to repeal
.59 G. 3, c. 7.
Short title.

25. Nothing in this act contained shall be construed to affect the rights and privileges of the corporation of cutlers of the liberty of Hallamshire in the county of York, nor shall anything in this act contained be construed in any way to repeal or make void any of the provisions contained in the fifty-ninth George Third, chapter seven, intituled *An Act to regulate the Cutlery Trade in England*.

26. The expression "The Merchandise Marks Act, 1862," shall be a sufficient description of this act.

THE COMPANIES ACT.

25 & 26 VICT. CAP. 89.

An Act for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations.—[7th August 1862.]

Penalty on falsi-
fication of books.

166. If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.

Prosecution of
delinquent
directors in the
case of winding-
up by court.

167. Where any order is made for winding-up a company by the court or subject to the supervision of the court, if it appear in the course of such winding-up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in such winding up, or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

Prosecution of
delinquent di-
rectors, &c., in
case of volun-
tary winding-
up.

168. Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding-up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.

Penalty of per-
jury.

169. If any person, upon any examination upon oath or affirmation authorised under this act, or in any affidavit, deposition, or solemn affirmation in or about the winding-up of any company under this act, or otherwise in or about any matter arising under this act, wilfully and corruptly gives false evidence, he shall, upon conviction, be liable to the penalties of wilful perjury.

25 & 26 Vict. any juries or inquests whatsoever, and shall not be inserted in the lists to be prepared by virtue of the Principal Act or of this act.

The Juries Act, 1862. 3. All the provisions of the Principal Act relating to the functions of high constables shall be and are hereby repealed, except as to any liabilities incurred before such repeal, and the duties of high constables as set forth in the Principal Act shall cease and determine.

Provisions as to high constables repealed.

Clerk of the peace to issue precepts to parish officers by post.

4. The clerk of the peace in every county, riding, and division in England and Wales shall on or before the twentieth day of July in every year issue his precept (in the form set forth in the schedule to this act, or as near thereto as may be), to the churchwardens and overseers of the poor of the several parishes, and to the overseers of the poor of the several townships, within the county, riding, or division for which he acts, requiring them to make out before the first day of September then next ensuing a true list of all men residing within their respective parishes and townships qualified and liable to serve on juries according to the Principal Act, and also to perform and comply with all other the requisitions in the said precepts contained, and shall forward the same, together with a competent number of printed forms of returns, for the use of the respective persons by whom such returns are to be made, by post, in a registered letter having the words "Jury Precept" legibly written or printed on the outside thereof, and addressed to the churchwardens and overseers as aforesaid; and every precept delivered or tendered as a registered letter at the address of the person to whom it is addressed, whether a receipt be given for the same or not shall be deemed to have been served on the person to whom the same was so delivered or tendered, and if delivered or tendered to any one churchwarden or overseer of a parish or township shall be deemed to have been served on the whole of the churchwardens and overseers of such parish or township.

Precepts, &c. to be printed at the expense of the county, &c.

5. The provisions of the Principal Act as to the expense of printing the warrants, precepts, and returns therein mentioned shall apply to the printing of the precepts and returns required by this act; and the precepts and jury lists required to be posted and registered by this act shall be posted and registered at the expense of the county, riding, or division.

Duties and liabilities of parish officers to continue.

6. After the receipt of such precept from the clerk of the peace, the duties of the churchwardens and overseers with reference to the jury lists, and the penalties to which they are liable for making default therein, shall be in all respects the same as if the words "clerk of the peace" had been substituted for the words "high constable" in the eighth section of the Principal Act.

As to notices of special petty sessions.

7. No notice shall be sent to the high constable of the holding of a special petty sessions for the production of the jury lists, as required by the tenth section of the Principal Act.

Justices to adjourn petty sessions for the production of list.

8. It shall be lawful for the justices of the peace then present to adjourn any special petty sessions held under the provisions of the tenth section of the Principal Act to any day within seven days thereafter, for the production of the jury list for any parish or township which, through the default of any churchwarden or overseer, has been omitted to be produced at such special petty sessions, and notice shall be sent by the clerk to such justices to such churchwardens or overseers requiring them to produce the said list at such adjournment.

25 & 26 Vict.
c. 107.
The Juries Act,
1862.

post to the Returned Letter Office in London, in order that it may be returned to the sender : Provided always, that when any summons shall be served by post under the provisions of this act, two additional days shall be allowed for the transmission of such summons by post, over and above the number of days required by law for the service of a summons, before the day on which the juror is required to attend.

Fines may be
remitted upon
cause shown.

12. Whenever any fine shall be imposed upon any person for not attending as a juror in obedience to a summons in that behalf, it shall not be lawful to estreat the said fine until after the expiration of fourteen days, and in the meantime the proper officer of the court by which such fine was imposed shall forthwith, by letter, inform the said person of the imposition of such fine, and require him, within six days after the date of such letter, to forward him an affidavit of the cause, if any, of his non-attendance ; and such officer shall, upon the receipt of any such affidavit, submit the same to the said court, or the judge or chairman who presided at the said court at the time when such fine was imposed, and such court, judge, or chairman shall have power to remit such fine.

Sheriffs to be
allowed costs
of summonses.

13. The costs incurred by any sheriff in summoning jurors by post, under the provisions of this act, so far as the same shall not exceed the sum allowed to such sheriff, or his predecessor in office, on that account, in any one year within the three years immediately preceding the passing of this act, may be included in his ordinary bill of cravings, and shall be allowed by the Commissioners of Her Majesty's Treasury.

Extent of act.
Jury lists to be
made, &c. in
the City of Lon-
don as before.

14. This act shall not extend to Scotland or Ireland ; and nothing in this act contained shall alter or affect the mode of procedure heretofore pursued in the making out of jury lists or the summoning of jurors in the city of London.

Commencement
of act.

15. This act shall come into operation on the tenth day of August, one thousand eight hundred and sixty-two.

SCHEDULE.

Precept for returning Lists of Jurors.

County of	}	To the churchwardens and overseers of the poor of the parish [or, to the overseers of the poor of the township] of .
to wit.		
Hundred of		

You are hereby required to make out, before the first day of September next, a true list in writing in the form hereunto annexed, containing the names of all men, being natural-born subjects of the Queen, between the ages of twenty-one and sixty, residing within your parish [or township] qualified to serve upon juries ; that is to say, of every such man who has in his own name, or in trust for him, a clear income of ten pounds by the year in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, situate in the said county, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple or fee tail, or for his own life, or for the life of any other person, and also of every such man who

has a clear income of twenty pounds by the year in lands or tenements situate in the said county, held by lease for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, and also of every such man who is a householder in your parish [or township], and is rated or assessed to the poor rate or to the inhabited house duty on a value of not less than twenty pounds [if in Middlesex thirty pounds], and you are required to make out the said list in alphabetical order, and to write the christian and surname of every man at full length, and the place of his abode, his title, quality, calling, or business, and the nature of his qualification, in the proper columns of the forms hereunto annexed, according to the specimens given in such columns for your guidance.

25 & 26 Vict.
c. 107.

The Juries Act,
1862.

And if you have not a sufficient number of forms you must apply to me for more ; and in order to assist you in making out the list you are to refer to the poor rate, and you may, if you think proper, apply to any collector or assessor of taxes, or any other officer who has the custody of any house tax, land tax, or other tax assessment for your parish [or township], and take from thence the names of men so qualified : And in making such list you are to omit the names of all peers, all judges, all clergymen, all Roman Catholic priests who shall have duly taken and subscribed the oaths and declaration required by law ; all ministers of any congregation of Protestant dissenters whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster, and produce to you a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law ; all serjeants and barristers at law, all members of the Society of Doctors of Law, and all advocates of the Civil Law, if actually practising, and all attorneys, solicitors, and proctors, if actually practising, and having taken out their annual certificates, and their managing clerks ; all officers of the Courts of Law and Equity, and of the Admiralty and Ecclesiastical Courts, if actually exercising the duties of their respective offices ; all coroners, all gaolers and keepers of houses of correction, and all subordinate officers of the same ; all members and licentiates of the Royal College of Physicians in London, all members of the Royal Colleges of Surgeons in London, Edinburgh, and Dublin, and apothecaries certificated by the Court of Examiners of the Apothecaries Company, and all registered pharmaceutical chemists, if actually practising as physicians, surgeons, or apothecaries, or pharmaceutical chemists respectively ; all officers of the Navy and Army on full pay ; the master, wardens, and brethren of the Corporation of Trinity House of Deptford Strond, and their clerks, officers, and servants ; all pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the Buoy and Light Service employed by either of those corporations, and all pilots licensed under any Act of Parliament or charter for the regulation of pilots ; all the household servants of Her Majesty ; all Commissioners of Property and Income Tax ; all officers of the Post Office ; all officers of Customs and Excise ; all sheriff's officers, high constables, and parish clerks ; all officers of the Rural and Metropolitan Police ; and also all persons exempt by virtue of any Act of Parliament, prescription, charter, grant, or writ.

And when you have made out such list you are authorized to order a sufficient number of copies thereof to be printed, the expense of which printing will be allowed you by the parish [or township], and you are

25 & 26 Vict. c. 107.
The Juriss Act,
 1862.

required, on the three first Sundays in September next, to fix a copy of such list, signed by you, on the principal door of every church, chapel, or other public place of religious worship within your parish [or township], and also to subjoin to every such copy a notice to the following effect, inserting the time and place, of which you shall be previously informed: "Take notice, that all objections to the foregoing list will be heard by the Justices in Petty Sessions on the day of September next, at the hour of , at ;" and you must allow any inhabitant of your parish [or township] to inspect the original list, or a true copy of it, during the three first weeks of September next, gratis; and you are also further required to produce the said list at such petty sessions, and there to answer on oath such questions as shall be put to you by Her Majesty's justices of the peace there present touching the said list; and these several matters you are in nowise to omit, upon the peril that may ensue.

Given under my hand at in the said county the day
 of in the year .

 Clerk of the Peace.

*The Form of Precept in Wales is to be altered according to the difference
 of Qualification.*

STATUTES AND PARTS OF STATUTES

AFFECTING THE CRIMINAL LAW PASSED IN THE SESSION OF
PARLIAMENT OF 1863.

MARRIAGES, &c. (IRELAND) ACT.

26 VICT. CAP. 27.

An Act to amend the Law relating to Marriages in Ireland.—[8th June 1863.]

15. Any person who shall knowingly or wilfully make any false declaration, or sign any false notice, required by the said recited act or by this act, for the purpose of procuring any marriage, shall suffer the penalties of perjury. Penalty on making false declaration, or giving false notice.

CORRUPT PRACTICES PREVENTION ACTS.

26 VICT. CAP. 29.

An Act to amend and continue the Law relating to Corrupt Practices at Elections of Members of Parliament.—[8th June 1863.]

Legal Proceedings.

5. The provisions of the fourteenth section of the Corrupt Practices Prevention Act, 1854, shall extend to a misdemeanor or to any offence under the Corrupt Practices Prevention Acts not punishable by a penalty or forfeiture, as well as to proceedings for any offence punishable by a penalty or forfeiture. Sect. 14 of 17 & 18 Vict. c. 102, extended to misdemeanors, &c.

26 Vict. c. 29.

*Corrupt
Practices
Prevention
Acts.*

General allegations sufficient in indictments.

Evidence of witness on election committee and before commissions.

6. In any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was at the election at or in connexion with which the offence is intended to be alleged to have been committed guilty of bribery, treating, or undue influence (as the case may require); and in any criminal or civil proceedings in relation to any such offence the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat.

7. No person who is called as a witness before any election committee, or any commissioners appointed in pursuance of the act of the session holden in the fifteenth and sixteenth years of the reign of Her present Majesty, chapter fifty-seven, shall be excused from answering any question relating to any corrupt practice at, or connected with, any election forming the subject of inquiry by such committee or commissioners, on the ground that the answer thereto may criminate or tend to criminate himself: Provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be) to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the committee, under the hand of their clerk, or from the commissioners, under their hands (as the case may be), a certificate stating that such witness was, upon his examination, required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to which criminated or tended to criminate him, and had answered all such questions or such question; and if any information, indictment, or action be at any time thereafter pending in any court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such acts committed by him previously to the time of his giving his evidence, and at or in relation to the election concerning or in relation to which the witness may have been so examined, the court shall, on production and proof of such certificate, stay the proceedings in such last-mentioned information, indictment or action, and may, at its discretion, award to such witness such costs as he may have been put to in such information, indictment, or action: Provided that no statement made by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal.

SECURITY FROM VIOLENCE ACT.

26 & 27 VICT. CAP. 44.

An Act for the further Security of the Persons of Her Majesty's Subjects from personal Violence.—[13th July, 1863.]

WHEREAS by the forty-third section of the sessions of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six, it is provided that "whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall together with one or more other person or persons rob or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person;" and by the twenty-first section of the act of the same session, chapter one hundred, that "whosoever shall by any means attempt to choke, suffocate, or strangle any person, or by any means calculated to choke, suffocate, or strangle, attempt to render any person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement:" and whereas the punishment awarded by the said sections is insufficient to deter from crimes of violence: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Where any person is convicted of a crime under either of the said sections, the court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice, or thrice privately whipped, subject to the following provisions:

Power to award
punishment
whipping in
cases herein
named.

1. That in the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod:
 2. That in the case of any other male offender the number of strokes do not exceed fifty at each such whipping:
 3. That in each case the court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used:
- Provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence; provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison with a view to his undergoing his sentence of penal servitude.

PRISON MINISTERS ACT.

26 & 27 VICT. CAP. 79.

An Act for the Amendment of the Law relating to the Religious Instruction of Prisoners in County and Borough Prisons in England and Scotland.—[28th July, 1863.]

WHEREAS it is expedient to amend the law relating to prisons in England and Scotland with respect to the religious instruction of the prisoners confined therein: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

Sect. 1. This act may be cited for all purposes as "The Prison Ministers Act 1863."

Act to apply to all gaols, &c.

2. This act shall apply in England to all gaols, prisons, and houses of correction (hereinafter included under the terms "prisons") that are maintained at the expense of any county, riding, division, or liberty of a county, or of any county of a city, county of a town or borough, and in Scotland to all local prisons as defined by "The Prisons (Scotland) Administration Act, 1860."

Power to appoint additional ministers to prisons—
Regulation as to admission of ministers.

3. Where the number of prisoners confined in any prison to which this act applies, and belonging to some church or religious persuasion differing, if in England, from the Church of England, and if in Scotland, from the Church of Scotland, is so great as, in the opinion of the justices, county board, or other persons having the appointment of chaplain in the said prison, to require the ministrations of a minister of their own church or persuasion, the said justices, county board, or other persons may appoint a minister of such last-mentioned church or persuasion to attend at the said prison on the prisoners of his own church or persuasion, and they may, if they think fit, award to him a reasonable sum as a recompense for his services, such sum to be deemed a part of the expenses of the prison to which he is appointed, and to be paid out of the funds legally applicable to the payment of such expenses.

The visiting justices of any person may, if they think fit, without a special request being made by, but not against the will of, any prisoner of a church or religious persuasion differing from that of the Established Church, permit a minister of the church or persuasion to which such prisoner belongs (if no appointment of such a minister has been made under this act) to visit such prisoner at proper and reasonable times, under such restrictions imposed by them as may guard against the introduction of improper persons, and may prevent improper communications; provided that any prisoner shall, on request, be allowed, subject to the rules of the gaol, to attend the chapel or to be visited by the chaplain of the gaol. Every minister appointed or permitted to visit prisoners under this act shall hold his appointment or permission to visit

during the pleasure of the authority by whom he was appointed or permitted to visit, and shall conform in all respects to the regulations of the prison at which he attends. No minister shall be appointed under this act for any prison in which there is not a chaplain of the Established Church.

4. The keeper or other person performing the duties of keeper of a prison on receiving into his custody any prisoner shall enter his name in a book to be provided for the purpose, with the addition of the church or religious persuasion to which the prisoner shall declare himself to belong, and the said keeper or other person shall from time to time give to any minister appointed or permitted to visit prisoners in the prison a list of the prisoners so declared to belong to the church or persuasion of such minister, and no such minister shall be permitted to attend or visit any prisoner belonging to any religious persuasion differing from that to which such minister belongs. Keepers of prisons to register religion of prisoners.

5. So much of the thirtieth section of the said act passed in the fourth year of his late Majesty King George the Fourth, chapter sixty-four, as provides "that the chaplain shall frequently visit every room and cell in the prison occupied by prisoners, and shall direct such books to be distributed and read, and such lessons to be taught, in such prison, as he may deem proper for the religious and moral instruction of the prisoners therein, and that he shall visit those who are in solitary confinement," shall not apply to any prisoner who is attended or visited by a minister of a church or persuasion differing from the Church of England, except when the visits of any such minister shall have been discontinued for the period of fourteen days; and no prisoner belonging to any church or religious persuasion shall be compelled to attend any religious service held or performed by any chaplain, minister, or religious instructor of a church or religious persuasion to which the said prisoner does not belong. So much of sect. 30 of 4 Geo. 4, c. 64, as provides for visits of chaplains not to apply to prisoners visited by other ministers.

FORM OF INDICTMENT.

Indictment, under the Foreign Enlistment Act, charging a subject of the Queen with attempting to enlist in the service of a foreign power other British subjects, without having obtained the leave or licence of the Queen.

CENTRAL Criminal Court, } The Jurors for our Lady the Queen,
to wit. } upon their oath present, that Alfred Styles, late of the parish of Saint Martin-in-the-Fields, in the county of Middlesex, heretofore to wit, on the 27th day of July, in the year of Our Lord 1863, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully did attempt and endeavour to procure one John Gregory to enlist as a soldier in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said John Gregory, then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist as a soldier in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over a certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid,

against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Court, unlawfully did attempt and endeavour to procure the said J. G. to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist as a soldier in the military service of, or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to engage to enlist as a soldier in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist as a soldier in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to engage to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of Government over a certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under

*Form of
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Indictment,
under Foreign
Enlistment Act,
charging a
subject of the
Queen with
attempting to
enlist in the
service of a
foreign power
other British
subjects,
without having
obtained the
leave or licence
of the Queen.

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Indictment,
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the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist as a soldier in the military service of or for or in aid of the said persons, whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Sixth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day, and in the year aforesaid, within the United Kingdom of Great Kingdom and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to engage to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G. then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering or engaging to enlist as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who were then assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to enter as a soldier in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he the said J. G. then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering or engaging to enlist as a soldier in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Eight count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to enter as a soldier in the military service of and for and in aid of certain persons whose names are to the

jurors aforesaid unknown, who then were assuming to exercise the powers of government over a certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering or engaging to enlist as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

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Indictment,
under Foreign
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subject of the
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attempting to
enlist in the
service of a
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subjects,
without having
obtained the
leave or licence
of the Queen.

Ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to enter as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering or engaging to enlist as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Tenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to serve and be employed in certain warlike and military operations as a soldier in the service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of serving or being employed in any warlike or military operations as a soldier in the service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Eleventh count.—And the jurors aforesaid, upon their oath aforesaid,

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Indictment,
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do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, and within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to serve and be employed in certain warlike and military operations as a soldier in the service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of serving or being employed in any warlike or military operations as a soldier in the service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Twelfth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said J. G. to serve and be employed in certain warlike and military operations as a soldier in the service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said J. G., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of serving or being employed in any warlike or military operations as a soldier in the service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such cases made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Thirteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the 30th July, A.D. 1863, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure one Frederick Harvey to enlist as a soldier in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of

our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering or engaging to enlist as a soldier in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Fourteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said F. H. to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering or engaging to enlist as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Fifteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said F. H. to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity,

Sixteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in

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Indictment.*

Indictment,
under Foreign
Enlistment Act,
charging a
subject of the
Queen with
attempting to
enlist in the
service of a
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other British
subjects,
without having
obtained the
leave or licence
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the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said F. H. to engage to enlist as a soldier in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H. then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Seventeenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said F. H. to engage to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over a certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Eighteenth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said F. H. to engage to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of

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Indictment,
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subjects,
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and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Twenty-second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said F. H. to serve and be employed in certain warlike and military operations as a soldier in the service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of serving or being employed in any warlike or military operations as a soldier in the service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Twenty-third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said F. H. to serve and be employed in certain warlike and military operations as a soldier in the service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said F. H., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of serving or being employed in any warlike or military operations as a soldier in the service of or for or in aid of the said persons, whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Twenty-fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the

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of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Twenty-seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said T. H. P. d'I. to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said T. H. P. d'I., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Twenty-eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said T. H. P. d'I. to engage to enlist as a soldier in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said T. H. P. d'I., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Twenty-ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said T. H. P. d'I. to engage to enlist as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of govern-

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aforesaid, do further present, that the said A. S. afterwards, to wit, on the same day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said T. H. P. d'I. to enter as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over a certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said T. H. P. d'I., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Thirty-third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said T. H. P. d'I. to enter as a soldier in the military service of and for and in aid of certain persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, he, the said T. H. P. d'I., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as a soldier in the military service of or for or in aid of the said persons whose names are to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Thirty-fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure the said T. H. P. d'I. to serve and be employed in certain warlike and military operations as a soldier, in the service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, he, the said T. H. P. d'I., then being a natural born subject of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either

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the said 27th of July, A.D. 1863, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons, whose names are to the jurors aforesaid unknown, to enlist as soldiers in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, the said persons in this count mentioned, whose names are to the jurors aforesaid unknown, then being natural born subjects of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as soldiers in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Thirty-eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons, whose names are to the jurors aforesaid unknown, to enlist as soldiers in the military service of and for and in aid of certain other persons whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the kingdom of Poland, the said persons in this count first mentioned, whose names are to the jurors aforesaid unknown, then being natural born subjects of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as soldiers in the military service of or for or in aid of the said other persons whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Thirty-ninth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons, whose names are to the jurors aforesaid unknown, to enlist as soldiers in the military service of and for and in aid of certain other persons, whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, the said persons in this count first mentioned, whose names are to the jurors aforesaid unknown, then

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Forty-second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons whose names are to the jurors aforesaid unknown, to engage to enlist as soldiers in the military service of and for and in aid of certain other persons whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, the said persons in this count first mentioned, whose names are to the jurors aforesaid unknown, then being natural born subjects of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as soldiers in the military service of or for or in aid of the said other persons whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Forty-third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. heretofore, to wit, on the said 27th day of July, A.D. 1863, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons, whose names are to the jurors aforesaid unknown, to enter as soldiers in the military service of and for and in aid of certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, the said persons in this count mentioned, whose names are to the jurors aforesaid unknown, then being natural born subjects of our said Lady the Queen and not having obtained the leave or licence of our said Lady the Queen, either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of enlisting or entering, or engaging to enlist, as soldiers in the military service of or for or in aid of the said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Forty-fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons, whose names are to the jurors aforesaid unknown, to enter as soldiers in the military service of and for and in aid of certain other persons whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, the said persons in this count first mentioned, whose

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Forty-seventh count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons, whose names are to the jurors aforesaid unknown, to serve and be employed in certain warlike and military operations as soldiers in the service of and for and in aid of certain other persons, whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over certain foreign people, to wit, the Poles, then inhabiting a certain foreign country, to wit, the Kingdom of Poland, the said persons in this count first mentioned, whose names are to the jurors aforesaid unknown, then being natural born subjects of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of serving or being employed in any warlike or military operations as soldiers in the service of or for or in aid of the said other persons, whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government over said foreign people as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Forty-eighth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. S. afterwards, to wit, on the said last-mentioned day, and in the year aforesaid, within the United Kingdom of Great Britain and Ireland, to wit, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to procure divers persons, whose names are to the jurors aforesaid unknown, to serve and be employed in certain warlike and military operations as soldiers in the service of and for and in aid of certain other persons, whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over a certain foreign country, to wit, the Kingdom of Poland, the said persons in this count first mentioned, whose names are to the jurors aforesaid unknown, then being natural born subjects of our said Lady the Queen, and not having obtained the leave or licence of our said Lady the Queen either under the Sign Manual of our said Lady the Queen, or signified by Order in Council, or by Proclamation of our said Lady the Queen, or in any other manner whatever, for the purpose of serving or being employed in any warlike or military operations as soldiers in the service of or for or in aid of the several other persons, whose names are also to the jurors aforesaid unknown, who then were assuming to exercise the powers of government in and over the said foreign country as aforesaid, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity.

Arrest by police-constable—Warrant—Assault, 127.

ASSAULT.

Where an information charged a prisoner with having unlawfully assaulted and abused a woman, and after a discussion between the attorney for the prosecutrix, the attorney for the prisoner, and the justices, it was agreed not to proceed with a charge of rape under that information, but to proceed under the Aggravated Assaults Act, and the only evidence of the assault was that given by the prosecutrix herself, who swore that the prisoner violated her person against her will, and the magistrates thereupon convicted the prisoner of an aggravated assault under the 16 & 17 Vict. c. 30, and sentenced him to six months' imprisonment:

Held, (per Pollock, C.B. and Wilde, B.) that an assault with intent to commit any other offence is itself an offence distinct from a common assault. That by 9 Geo. 4, c. 31, and 16 & 17 Vict. c. 30, magistrates have jurisdiction over common assaults only. That where the jurisdiction depends on certain facts being proved or not proved, the decision of the magistrates as to the proof of those facts is conclusive, but that the court will consider the facts so as to determine what was the nature of the charge before the magistrates; and that on the facts of this case the magistrates had exceeded their jurisdiction by convicting on a charge of assault other than a common assault:

Held, *contra* (per Bramwell and Channell, B.B.), that in point of form, a charge of assault only was brought before the magistrates, and that it was not competent for the court to review the evidence on which the decision of the magistrates was founded. *Re William Thompson*, 70.

A certificate of justices of the dismissal of an information for a common assault may be pleaded in bar to an indictment founded upon the same assault, though the assault in such indictment is alleged as having caused grievous bodily harm.

An information was laid against the defendants before justices for a common assault. Upon the hearing it was dismissed, and the justices granted their certificate of such dismissal pursuant to sect. 27 of the 9 Geo. 4, c. 31. The prosecutor then preferred an indictment against the defendants upon the same facts, and inserted therein three counts: the first for an assault, doing grievous bodily harm; second, for an assault, causing actual bodily harm; and, third, for a common assault. To this indictment the defendants pleaded the former information for the as-

sault, its dismissal and the certificate of justices; to which pleas the prosecutor demurred:

Held, that the certificate granted by the justices was a bar to the indictment. *Reg. v. R. J. Eltrington and H. H. Eltrington*, 86.

A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all Her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G. and convey him before two justices of C., to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station-house. W. G. was rescued by several persons, who assaulted the constables, whereupon information for the rescue and assault were laid against the parties by the constables, and at the hearing before justices, the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted:

Held, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time:

Held also, that the withdrawal of the information as to the rescue was no bar to proceeding with the complaint as to the assault. *Galliard (app.) v. Larton (resp.)*, 127.

Act for further punishment of, App. v.

ATTEMPT

To commit a felony by breaking and entering a shop, 98.

To commit larceny—Proximate act—Ownership, 100.

To procure abortion, 152.

ATTORNEY

For prisoner in forgery—Privilege, 281.

AUTREFOIS ACQUIT.

Prisoner, a servant, was committed to take his trial at the April Sessions on a charge of stealing copper from his masters. He was tried and acquitted. Two days before his trial the prosecutors laid an information and obtained a warrant, under which the prisoner was apprehended, immediately after the acquittal, for stealing other things (five shovels and a riddle) from them previous to his ap-

bodily harm; in the second count with unlawfully and maliciously cutting, stabbing, and wounding; and in the third count with assaulting and occasioning actual bodily harm; the jury returned a verdict of guilty of a common assault. The chairman declined to take that verdict, on the ground that a common assault was not included in the indictment, and told the jury to reconsider their verdict. The jury then found the defendants guilty, and a verdict was entered of guilty of an assault occasioning bodily harm, whereupon the chairman sentenced the prisoners:

Held, that the first verdict ought to have been taken, and that the second ought not, and that the prisoners ought not to undergo the sentence; that there had been a mis-trial, and that a *venire de novo* should issue. *Reg. v. Joshua Yeadon and James Birch*, 91.

DEPOSITION.

Illness of witness—Admissibility of, 156.

In absence of witness from illness, 296.

Admission of, 339.

Irregularity in the mode of taking, 339.

Practice as to referring witness to, 409.

Proof of, 411.

ELECTIONS.

Corrupt practices at, Act relating to, App. liii.

EMBEZZLEMENT.

The prisoner was indicted for embezzling moneys received by him by virtue of his employment as clerk to North and others his masters. It is for the jury to say if the relation of master and clerk existed between the prosecutor and prisoner. *Reg. v. Chater*, 1.

Previous to 1855 the prisoner was in the prosecutor's service as cashier and collector, and another person, W., as salesman. In that year the prisoner and W. applied each for an increase of salary, and in the end the prosecutors agreed to allow each of them 12½ per cent. on the profits, in addition to their salaries, and if there was no profit in any year, neither the prisoner nor W. were to contribute anything towards the loss, but were to receive their salaries only. The prisoner and W. from time to time, instead of receiving their shares of profits at the end of the year, allowed portions of them to remain in the hands of the prosecutors at 7 per cent.:

Held, that the prisoner was a servant of the prosecutors, liable to be convicted of embezzlement, within the meaning of the

7 & 8 Geo. 4, c. 29, s. 47. *Reg. v. Donald M'Donald*, 10.

Upon the trial of an indictment charging the prisoner with embezzling three distinct sums of money, it appeared that on investigation of the books of a friendly society, kept by the secretary (the prisoner), it was discovered that he had not entered in the books subscriptions received by him in small sums of 1s., 2s. and 3s. at a time, amounting to more than 100l. The prisoner, on being called up n for an explanation, admitted that he had received the money, and was willing to repay the amount, and said that the law could not touch him. The books of the society kept by the prisoner were tendered generally in evidence on the part of the prosecution, whereupon it was objected on behalf of the prisoner, that the evidence should have been confined to the three particular entries referring to the three charges in the indictment. It was further contended for the prisoner that it was a breach of trust only, and that the prisoner on these facts could not be convicted of embezzlement. The objections were overruled, and the jury found the prisoner guilty:

Held, that upon these facts the jury might properly convict. *Reg. v. Wm. Proud*, 22.

By the certified rules of an enrolled benefit building society, mortgages were directed to be made to the trustees, and the redemption-money to be paid to the directors; and it was no part of the secretary's duty, as prescribed by the rules, to receive subscriptions or other moneys for the society. The course of business, however, was that the management of the society was left almost entirely to the secretary, and he frequently received subscriptions. The mortgages were made to the trustees, but when redeemed the money was paid to the secretary for the trustees. The secretary having embezzled the redemption-money upon a mortgage so paid to him:

Held, upon an indictment under the 7 & 8 Geo. 4, c. 27, s. 47, that the jury were warranted upon this evidence in finding that the money was received by virtue of his employment and for his masters. *Reg. v. John Hastie*, 264.

Two friendly societies appointed a committee, of which the defendant was a member, to conduct an excursion; the committee employed the defendant and several others to sell tickets. It was his duty to pay over the money so received (which was to belong to the two societies) to a person appointed by the committee, but he received no remuneration for his services:

Held, that he was a joint owner of the

money, and not a clerk or servant within the 24 & 25 Vict. c. 96, s. 68, liable to be indicted for embezzlement. *Reg. v. G. H. Bren*, 398.

A County Court bailiff was indicted for embezzling moneys of the prosecutor, the high bailiff. The moneys embezzled were received on levies under County Court processes :

Held, that the charge could not be sustained, as the relation of master and servant did not exist between the bailiff and high bailiff, nor was the bailiff bound to pay over the fees to him. *Reg. v. John Glover*, 500.

EVIDENCE.

I. DEPOSITIONS.

II. MISCELLANEOUS.

I. Depositions.

A deposition taken by virtue of 11 & 12 Vict. c. 42, s. 17, may be read in evidence against the prisoner, although taken before two magistrates who acted only upon that occasion, and the prisoner was afterwards committed for trial by another magistrate. *Reg. v. de Vidil*, 4.

It is a question for the presiding judge to determine whether the proof of a witness being so ill as not to be able to travel, within the meaning of the 11 & 12 Vict. c. 42, s. 17, is sufficient for the purpose of admitting his deposition before the committing magistrate. Therefore, when the deposition was admitted upon evidence that the prosecutrix was daily expecting her confinement and otherwise poorly, and therefore too ill to travel, this court declined to interfere with the exercise of the discretion of the presiding judge. *Reg. v. William Stephenson*, 156.

In the absence of medical evidence, depositions not allowed to be read. *Reg. v. Wellon*, 296.

To the depositions of a marksman, the petty sessions clerk attached the prisoner's name, so that it appeared to have been signed by the prisoner's mark :

Held, that this deposition was properly received in evidence against the prisoner. *Reg. v. Mullen*, 339.

The deposition of the witness was placed in his hands by prisoner's counsel, and he was asked if, after looking at it, he adhered to an answer just given :

Held, that the deposition could not be so used unless it was formally made the prisoner's evidence. *Reg. v. Brewer and others*, 409.

Depositions taken before the coroner of a witness too ill to attend may be sent before the grand jury. *Reg. v. Mooney*, 411.

II. Miscellaneous.

A witness may be asked by prisoner's counsel as to what he said before coroner, without putting in the depositions. *Reg. v. Maloney*, 26.

On the trial of an information against the defendant for bribery at a parliamentary election, filed by the Attorney-General, in pursuance of a resolution of the House of Commons, a person, alleged in the indictment to have been bribed, was called as a witness ; he refused to answer any question, on the ground that the answer would tend to criminate him. A pardon under the Great Seal was then handed to the witness, but he still refused to answer, upon which the judge compelled him to answer, and on his evidence the defendant was convicted :

Held, that the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the Crown was concerned ; and that, though the witness might still be liable to an impeachment by the House of Commons, notwithstanding the pardon, by reason of the 12 & 13 Will. 3, c. 2, yet that was so unlikely to happen that the witness could not be said to be in any real danger, and he was therefore rightly compelled to answer.

To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of imaginary character, having reference to some barely possible contingency. *Reg. v. Boyes*, 32.

Under the 24 & 25 Vict. c. 97, s. 51, evidence of damage committed at several times, in the aggregate, but not at any one time exceeding 5*l.*, will not sustain an indictment. *Reg. v. Williams*, 338.

Answer by prisoner, after his arrest, to a question asked by police constable inadmissible. *Reg. v. Bodkin*, 403.

Comparison of handwriting—Police officers and constables are not admissible as experts. *Reg. v. Wilbain and Ryan*, 448.

Of false pretences—Person from whom property was obtained, 16.

Of brothel-keeping by landlord, 25.
 Question as to what was said before coroner, 26.
 Privilege of witness on ground of tendency of answers to criminate—Pardon, 32.
 In perjury, to affect credit of principal witness, 105.
 Of demand of property by menace, 268.
 In fraudulent bankruptcy—Of obtaining goods on credit, 299.
 On false pretences of an existing fact, 299.
 Of being armed at night with intent to break and enter, 307.
 At coroner's inquest—Juror hearing only part of the evidence, 373.
 Of false personation of a voter, 412.
 Inadmissibility of when part of indictment quashed for having been preferred without leave, 430.
 Of larceny—Recent possession, 437.
 In false pretences—Of acts of accomplice not included in the charge, 441.
 Of indecent exposure, 446.
 Of false pretences—Particularity, 460.
 Of receiving—Recent possession, 464.
 Of commencement of prosecution in night poaching, 475.
 Of false pretences, 492.
 Of attempt to commit larceny, 497.
 Of embezzlement, 500.
 Of perjury, 503.
 Of larceny by bailes—Possession, 505.
 Of concealment of birth, 506.

EXTRADITION ACTS.

Under the 6 & 7 Vict. c. 76 (an Act for giving effect to a treaty between England and the United States, for the apprehension of certain offenders), there is no power to commit accused persons to gaol for the purpose of being delivered up to the United States authorities, unless the United States have exclusive jurisdiction to try and punish the accused.

It is not necessary that there should be any warrant issued or depositions taken in the United States, in order to found a requisition by the United States authorities for the delivery up of any accused person under the Act 6 & 7 Vict. c. 76.

It is not necessary for the magistrate who commits an accused person to gaol in pursuance of the Act, to state in his warrant that the evidence on which it issued was given upon oath.

The word "piracy," in the treaty, does not mean piracy *jure gentium*, but a crime made such by the municipal law of one only of the parties to the treaty, and over which that party has exclusive jurisdiction. *Re Ternan and others*, 522.

FALSE PRETENCES.

The indictment charged the prisoner with obtaining the sum of 5s. 6d., the moneys of G. B., by false pretences from G. B. It was proved that the prisoner falsely pretending to be an agent for a loan society, and that he could procure a loan from it for G. B., claimed 5s. 6d. for his charge, G. B. sent him to his wife for it, and she gave the prisoner 5s. 6d. of her husband's money:

Held, that the evidence supported the allegation in the indictment that the prisoner obtained the money from G. B. *Reg. v. Thomas Moseley*, 16.

The venue in an indictment for obtaining sheep by false pretences was laid in the county E., where the prisoner was convicted. It appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into the county of E., where he was apprehended:

Held, that he had been indicted in a wrong county. *Reg. v. Stanbury*, 94.

Money was obtained by the prisoner from an unmarried woman on the false representations that he was a single man, and that he would furnish a house with the money, and then marry her:

Held, that the false representation of an existing fact (that he was not a single man) was sufficient to support a conviction for false pretences, although the money was obtained by that representation, united with the promise to furnish a house and then marry her. *Reg. v. John Jennison*, 158.

It was the duty of the prisoner, a clerk, to pay dock dues upon goods exported by his master, and upon ascertaining the amount required upon each day's export before paying it, to obtain the sum from his master's cash-keeper. The prisoner, knowing that 1l. 3s. only was due on a certain day, fraudulently represented to the cash-keeper that a larger sum was due, and having obtained that he paid the 1l. 3s. only, and appropriated the difference to his own use:

Held, that although the evidence would have been sufficient to support an indictment for false pretences, he was not guilty of larceny. *Reg. v. Hamilton Thompson*, 222.

A. having invented an improved lamp, entered into a partnership deed with B. and C. for carrying out and vending the subject of the invention. By a subsequent verbal agreement with his co-partners he was to travel about to obtain orders for the lamps upon a commission. On all orders received by him such commission (besides his travelling and personal expenses) was to be paid to him as soon as he received the orders, and to be

payable out of the capital funds of the partnership before dividing any profits. By falsely representing to his co-partners that he had obtained orders upon which his commission would be 12*l.* 10*s.*, he obtained from them that amount :

Held, that, as the subject-matter of the misrepresentation would come under consideration in the partnership accounts, such misrepresentation was not sufficient to sustain an indictment for false pretences against A. *Reg. v. I. M. Evans*, 238.

The prosecutor lent 10*l.* to the prisoner on the false pretence that he was going to pay his rent, and if the prisoner had not told him that he was going to pay his rent, the prosecutor would not have lent the money :

Held, that this was not a false pretence of any existing fact to warrant a conviction. *Reg. v. Lewis Lee*, 304.

An indictment charged K. and W. with falsely pretending to B. that they had a quantity of tobacco, which they proposed to sell, and did sell to him, and thereby obtained money from him. The evidence was that K. and another person P., acting together, were the chief parties by whom the false pretences had been made :

Held, that the acts of P. were the acts of K., and admissible against him upon the indictment. *Reg. v. Kerrigan*, 441.

The indictment charged that prisoners falsely pretended that two loads of soot which the prisoners then delivered weighed 1 ton 17 cwt., whereas they weighed but 1 ton 13 cwt., by means of which false pretence the prisoners obtained 8*s.*

The evidence was that a contract existed between prosecutor and prisoners for soot, which prosecutor was to buy at the rate of 38*s.* per ton. Deliveries were made from time to time, and payment was made according to the quantities pretended to be delivered. The prisoners put broken bricks and slack among the soot in their cart, and went to a public weighing machine, and got the whole weighed and a ticket of such weight given. Afterwards the bricks and slack were removed, and the cart with the soot in it taken to the prosecutor's and the soot delivered and the tickets presented and payment made by the prosecutor according to the weights specified in the ticket :

Held, that the indictment was sufficiently specific in form, and that the prisoners were indictable for obtaining money by false pretences. *Reg. v. James Lee and another*, 460.

An indictment for obtaining money by false pretences, alleged that prisoners pretended to P., who lived at T.'s and acted as T.'s

representative, that C. had come from London to the residence of H., and that P. was to give C. 10*s.*, and that T. was going to allow C. 10*s.* a-week for the benefit of his health :

Held, that the indictment did not state with sufficient certainty a false pretence of an existing fact. *Reg. v. Henshaw and Clark*, 472.

An indictment for false pretences alleged that the prisoner pretended he was the servant of Mr. Hardman, and was sent to buy a horse for him, whereby the prisoner unlawfully obtained a horse from the prosecutor. The evidence was, that the prisoner represented himself as the servant of Mr. Hardman, but the prosecutor's son, confounding the name with that of Harding, a person whom he knew, said in the prisoner's presence to his father, "I am going to sell the horse to Mr. Harding," whereupon the prisoner adapted his story to meet that belief of the prosecutor and his son, and so obtained the horse :

Held, that a conviction could not be sustained, as the pretence by which the horse was obtained was, that the prisoner was the servant of Mr. Harding, and that was not averred in the indictment.

To prevent a prisoner indicted for false pretences from being acquitted on the ground that the offence is that of felony (24 & 25 Vict. c. 96, s. 88), the false pretences laid must be proved, for under the statute he is to be found guilty of the misdemeanor. *Reg. v. Bulmer*, 492.

FELONY.

A. S., after committing certain felonious acts, but before his apprehension and conviction, executed a voluntary settlement of personal estate in favour of his wife and children :

Held, that the settlement, having been executed with an intention to defeat the rights of the Crown, was void. *Re Saunders's Estate, Saunders v. Warton*, 267.
Forfeiture for—Settlement previous to conviction, 279.

FISHERIES.

The occupier of a fishing mill dam removed the hecks, but left the remainder of the contrivances for catching salmon, by which means the fish were stopped from going up the river. Without the hecks the fishery was not available :

Held, that the fishery did not cease to be a fishery because part of the machinery for catching fish had been removed, and that the occupier had been rightly convicted, under sect. 20, for not removing obstruc-

tions to the free passage of fish during the close season. *Hodgson (app.) v. Little (resp.)*, 327.

Appellant was owner of a fishery and a salmon cage, which cage was built upon a spur of mason work attached to the masonry of a weir or dam in the river Dee, belonging to another person, and over which dam appellant had no control. The cage was within fifty yards below the dam, which had no free gap or fish pass in it as required by sect. 12 of the Salmon Fishery Act 1861. The position of the cage was such that no fish could ascend or descend the river without getting into the cage from which subsequent escape was very difficult. The appellant's practice was to get the salmon out of the cage by means of a net, and it was admitted that this was a mode of fishing lawfully exercised by virtue of an ancient right at the time of the passing of the Act of 1861. An information was laid against appellant for taking six salmon out of the cage by means of a net on the occasion in question, and the justices convicted him of an offence against the 12th section of the Act, in having caught salmon otherwise than "by rod and line within fifty yards below a dam not having a fish pass attached thereto" in accordance with the Act. On appeal to the Exchequer, the court

Held, that the conviction was right.

First, the salmon cage is not a "fixed engine" within sect. 11, and if it were, and although it was a mode of fishing lawfully exercised by virtue of an ancient right at the time of the passing of the Act, yet the proviso at the end of sect. 11, that it should not apply to "fishing weirs" or "fishing mill dams" takes it out of the operation of sect. 11 altogether, and that section consequently has nothing to do with the present question.

Secondly, the second heading or division of sect. 12 is an absolute prohibition of the catching of salmon by any one in any manner, "except by rod and line" in the head race or tail race of any mill or within "fifty yards below any dam, unless such mill or dam has attached thereto a fish pass" in the form prescribed by sect. 12. Nor can the provisions of the Act be evaded by the fact that the weir and the salmon cage belong to different owners. The conviction therefore was right under the second division of sect. 12 of the Act. *Moulton (app.) v. Wilby (resp.)*, 318.

FORGERY.

Prisoner was indicted under 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, for forging a guarantee.

Such a document is the subject of forgery though no consideration appear. The 19 & 20 Vict. c. 98, s. 3, gives validity to such an undertaking. *Reg. v. Coelho*, 8.

A turnpike ticket is a receipt for money, and the forging, &c., thereof is a felony within the meaning of the 24 & 25 Vict. c. 98, s. 23. *Reg. v. James Fitch*, *Reg. v. John Howley*, 160.

The prisoner was the treasurer, and also a member of an unenrolled friendly society, and it was his duty to pay moneys received into the society's bankers. The prisoner produced to the society a fictitious book, purporting to be the bank pass-book, containing entries purporting to vouch that he had paid certain moneys into the bank, and that the bank acknowledged the receipt of them, which book did not truly represent the state of account. The prisoner having at various times drawn out moneys which he had appropriated for his own purpose, the jury found the prisoner guilty of presenting a false account with intent to obtain credit for having paid the moneys into the bank with a view to obtain other moneys from the society which he might fraudulently appropriate to his own use:

Held, that the prisoner, though a member of the society, might properly be convicted of uttering a forged receipt with intent, &c. *Reg. v. Charles Smith*, 162.

The prisoner was the paid secretary of an unenrolled friendly society, of which his wife was a member. The prisoner delivered to the society a book on which was endorsed "Savings Bank, New-street, Huddersfield," and in which was an entry, "1855, Oct. 30, received 40l." It was proved that the entry was a forgery, and that the money had not been paid into the savings bank. The jury having found that the prisoner was guilty of knowingly uttering with intent to deceive the society, and that he had, in fact, defrauded it, it was objected for the prisoner that being the husband of a member, he was a part owner, and could not be made criminally liable for defrauding his co-owners, and also, that the document was not the subject of forgery:

Held, that both objections were untenable, and that the conviction was right. *Reg. v. William Moody*, 166.

A solicitor for the prisoner is bound to produce a document when the prisoner is charged with an offence in respect of such document. *Reg. v. Brown*, 281.

The making on a glass plate a positive impression of an undertaking for the payment of money by a foreign state, by means of photography, without lawful authority or excuse.

is a felony within the 24 & 25 Vict. c. 98, s. 19. *Reg. v. Rinaldi*, 391.

FRIENDLY SOCIETY.

Larceny by member of—Trustees—Bailee, 13.
Embezzlement by secretary of, 22.
Forgery by member—Banker's pass-book—Entry of receipt, 162.
Embezzlement by secretary, 264.
Embezzlement by committee-man, 398.

HIGHWAY.

A permanent obstruction on a highway, erected and placed there without lawful authority, which renders the way less commodious to the public, is an unlawful act and a public nuisance at common law, although it be not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, and although the jury may think sufficient space for the public traffic remains. *Reg. v. The United Kingdom Electric Telegraph Company (Limited)*, 137.
On an indictment for a nuisance in obstructing a highway by erecting telegraph posts upon it, the judge directed the jury—first, that in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences one on each side, the right of passage or way, *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages; secondly, that a permanent obstruction erected on a highway, placed there without lawful excuse, which renders the way less commodious to the public, is an unlawful act and a nuisance at common law, and that if the jury believed that the defendants placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages and horses, or foot passengers, upon the parts of the highway where they stood, the jury ought to find the defendants guilty, and that the circumstances that the posts were not placed upon the hard or metalled part of the highway or upon a footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as

regards the legal right, and do not affect the right of the Crown to the verdict:

Held, that these directions were right. *Reg. v. The United Kingdom Electric Telegraph Company (Limited)*, 174.

To withdraw a part of the public highway from the use of the public is a general nuisance. A street tramway is such a withdrawal and such a nuisance.

An indictment charged the defendants with a nuisance by laying down an iron tramway on a common highway, and with conspiracy to commit a nuisance. It appeared at the trial that the tram was laid down by the defendant Train with the sanction of the vestry of Lambeth, in whom the management of the highways of the parish is vested by the Metropolis Management Act 1845. The evidence for the prosecution proved that the tramway was a source of danger and inconvenience to the public using the highway in the ordinary manner. The jury then interposed, and expressed their opinion that the tramway obstructed, in a substantial degree, the ordinary use of the highway for carriages and horses, and rendered it unsafe and inconvenient in a substantial degree. The defendants proposed to give evidence to show a great number of persons used the vehicles running on the line, whereby a large amount of expenditure by the public was saved:

Held, that such persons were not the persons using the highway in the ordinary manner, and that such evidence was inadmissible; and that the vestry had no power, under the 98th section of the Metropolis Local Management Act, to grant permission to the defendant Train to lay down such tramway. *Reg. v. Train and others*, 180.

HOMICIDE.

Regulation of under Mutiny Act, App. xxix.

HUSBAND AND WIFE.

Felonious receiving by — Guilty knowledge, 95.

Receiving by wife, 225.

INDECENT EXPOSURE.

It is sufficient to support an indictment for indecent exposure of the person, if the act is done in a place where a great many people can see it, although that place is not a highway; as where the exposure took place on the roof at the back of a house where it could be seen from the back windows of many neighbouring houses, and was seen by several persons therefrom. *Reg. v. George Thallman*, 388.

An indictment for indecent exposure, charging the offence to have been committed on a highway, is not sustained by evidence that the offence was committed in a place near the highway, though in full view of it.

An indecent exposure seen by one person only, and capable of being seen by one person only, is not an offence at common law. *Secus*, if there are other persons in such a situation as that they may be witnesses of the exposure. *Reg. v. John Farrell*, 446.

INDECENCY.

By exposure of the person—What is a public place, 388.

Evidence of, 446.

INDICTMENT.

The prisoner was indicted in the first count for embezzlement, and in the second for larceny, as a bailee, under the 20 & 21 Vict. c. 54. After plea pleaded and the jury were charged, and in the course of the trial, it was objected for the prisoner that the indictment was bad for misjoinder of counts. The court overruled the objection, and directed the prosecutor to elect upon which count he would proceed, and the prosecutor having elected to proceed upon the second count, the prisoner was found guilty thereon:

Held, that the conviction was right. *Reg. v. Edward Holman*, 201.

An application was made, a fortnight after the trial, to a judge of one of the superior courts, for his consent in writing to an indictment being preferred for perjury against a witness on a trial before him; and the only material laid before him in support of the application was a newspaper report of the trial, beneath which he wrote, "I consent to a prosecution in this case," and signed his name:

Held, a sufficient consent within the 22 & 23 Vict. c. 17, s. 1. *Reg. v. Bray*, 215.

The prisoner was indicted for embezzling the money of T. B. and others his masters, and the evidence was that T. B. was a partner in a company of more than twenty persons, some being called directors and others shareholders, and that they called themselves "The R. M. and H. Coal Company, Limited," which name was painted over the office door, and the shares were transferable without the consent of the other partners, and that a share ledger was kept. There was no formal proof of the company being registered under the Joint Stock Companies Act, or of its being a corporation:

Held, that the indictment properly laid the money as belonging to T. B. and others. *Reg. v. R. J. Frankland*, 273.

The indictment charged the prisoner with the intent to kill and murder Annie Welton. The prosecution failed to prove the child had ever borne such a name:

Held, that the indictment might be amended under the 14 & 15 Vict. c. 100, s. 1. *Reg. v. Welton*, 297.

An indictment under the 24 & 25 Vict. c. 97, s. 15, for the felony of damaging a machine with intent to destroy the same, charged the offence to have been committed "unlawfully and maliciously," in the language of the statute, but omitted the word "feloniously":

Held bad, as the word "feloniously" is a term of art and necessary in all indictments for felony, whether at common law or created by statute. *Reg. v. Ephraim Gray*, 417.

A prisoner was committed upon one charge only of false pretences, but an indictment was preferred, without leave as required by 22 & 23 Vict. c. 17, s. 1, and found by the grand jury containing a second charge of false pretences. The prisoner refused to plead, and the court directed a plea of not guilty to the whole indictment to be entered for him, and received evidence of both charges, after which the prisoner was convicted:

Held, that the proper course was to have quashed the part of the indictment relating to the second charge:

Held, also, that as evidence upon that charge would not then have been admissible, the conviction could not be supported. *Reg. v. Fridge*, 430.

An indictment found by a grand jury not having jurisdiction may be quashed at any stage, at the instance of the defendant, even after plea.

The want of jurisdiction may be shown by affidavit.

The defendant will be left to his writ of error where the want of jurisdiction is not clear.

The 24 & 25 Vict. c. 115, s. 57, enacts that every person who, upon any examination upon oath or affirmation, before any court martial, held in pursuance of the Act, shall wilfully and corruptly give false evidence, shall be liable to the penalties of wilful and corrupt perjury.

Quære, whether an indictment under that section is an indictment for perjury within the meaning of the Vexatious Indictments Act (22 & 23 Vict. c. 17)? *Reg. v. Heane*, 433.

For perjury, 218.

For fraudulent bankruptcy, 284.

Accessory after the fact under Bankruptcy Act for not discovering estate on examination, 424.

For indecent exposure, 446.
 For false pretences, 472.
 For three larcenies—Pleading, 479.
 Conviction on one count only, 516.
 Precedent of, under Foreign Enlistment Act,
 App. lviii.

INLAND REVENUE.

Act to regulate, App. x.

JOINT STOCK COMPANY.

Indictment—Partners—Corporation, 273.
 Act for regulating, App. xlvii.

JURISDICTION.

When upon the hearing by justices of an information, a claim of right is set up by the defendant, such claim, if made *bonâ fide* and with some show of reason, will oust their jurisdiction; and although it is for the justices to determine whether or not such claim of right is made *bonâ fide* and with a show of reason, yet, if they determine that it is not so made, this court will review their determination and overrule it if come to upon insufficient grounds. *Reg. v. Stimpson*, *Reg. v. Peak*, 356.

Of borough sessions in an indictment for keeping a disorderly house, 18.

Of magistrates on a charge of rape to convict of an assault, 70.

Entering *nolle prosequi* by the Crown, 120.

Of quarter sessions in larceny on the high seas, 220.

Of quarter sessions on an indictment for attempting to commit suicide, 247.

Of quarter sessions in libel—Mandamus, 342.

Claim of right—Nature of, 356.

Of quarter sessions in conspiracy, 516.

LARCENY.

I. BY BAILEE.

II. ATTEMPT TO COMMIT.

III. BY FINDING.

IV. GENERALLY.

V. POST-OFFICE.

I. By Bailee.

H., a member of a friendly society, was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, and was subject to the loss arising from the shop. H. had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of the management. The prisoner, also a member of the society, assisted in the shop without salary, and was indicted for stealing some marked

money which H. had placed in the till. The money was laid in the indictment as belonging to H.:

Held, that the money was properly laid in the indictment as belonging to H., and that the prisoner, although a member of the society, could be convicted of larceny. *Reg. v. William Webster*, 13.

The prisoner, a married woman, living with her husband, at the request of a lodger in her husband's house, took charge of his box containing, as the prisoner knew, money. She afterwards broke open the box, and stole the money. The husband had nothing to do with the transaction:

Held, upon a case reserved on an indictment containing counts against the prisoner as a bailee, and for larceny, that she was guilty upon either one or the other count. *Reg. v. Jane Robson*, 29.

A savings bank was duly constituted according to the 9 Geo. 4, c. 92; 3 Will. 4, c. 14; and 7 & 8 Vict. c. 83, of which the prisoner was a trustee, and also treasurer and secretary, or actuary, and acted as such. By the rules of the bank, the trustee and manager was declared to be personally responsible and liable for all moneys actually received by him on account of or to and for the use of the institution, and not paid over or disposed of according to the rules; and the secretary was to be liable for all money received, and was to pay regularly to the treasurer the balance due after each day's business. By the eighth rule the several sums of money belonging to the institution which the trustees thereof are authorised to invest under the 9 Geo. 4, c. 92, or under the rules or regulations of this institution, were to be paid into, and invested in the Bank of England, in the names of the Commissioners for the Reduction of the National Debt, according to the provisions of the said Act, and no such sum or sums of money were to be paid or laid out by the trustees in any other manner or upon any other security whatever, except such sums of money as from time to time should necessarily remain in the hands of the treasurer, to answer the exigencies thereof. That the trustees should pay into the Bank of England any money, not less than 50*l.*, to the account of the Commissioners for the Reduction of the National Debt, upon the declaration of the trustees, or any two or more of them, that such moneys belonged exclusively to the institution. The rules gave depositors the usual power of drawing out moneys deposited. The jury found, as a fact, that the prisoner was a trustee of the savings bank, and that, whilst he was such trustee, he converted and appropriated to his

own use divers sums of money (not less than 50*l.* each) which had been paid into or deposited in the savings bank, whilst he was such trustee, with intent to defraud :

Held, that the prisoner was a trustee within 20 & 21 Vict. c. 54, and that the rules were an instrument in writing creating an express trust within sect. 17. *Reg. v. Horatio Samuel Fletcher*, 189.

Upon the trial of an indictment for stealing the money of B., it was proved that B. received the money as the servant of a co-operative society of which the prisoner was a member, for the sale to members of goods provided by the common funds, and that B. was accountable to the treasurer for the money so received. The money was marked and put into a till under B.'s charge, from which the prisoner clandestinely took it :

Held, that B. was sufficiently possessed of the money to sustain a conviction for larceny of the money, although the prisoner was a member of the society. *Reg. v. William Burgess*, 302.

The prisoner was accustomed to fetch coals from the depôt with his own cart and horse, for different people, for remuneration. The prosecutor gave him 8*s.* 6*d.* to buy and fetch for him half-a-ton of coals. He went and procured 9 cwt. to be put into the cart and 1 cwt. into a sack, and paid 8*s.*, and subsequently the additional 6*d.* He delivered 9 cwt. only to the prosecutor, retaining the other 1 cwt. :

Held, that there was evidence of an appropriation of the coals to his own use, so as to vest the possession in the prosecutor and support a conviction for larceny as a bailee. *Reg. v. Bunkall*, 419.

To sustain a charge of larceny by a bailee it is necessary to prove some act of conversion inconsistent with the purposes of the bailment. *Reg. v. Jackson*, 505.

II. Attempt to Commit.

In order to convict of an attempt to commit larceny, it must appear that there was property in the place where the attempt is made, that could be stolen.

Therefore, where a person put his hand into the pocket of another, with intent to steal, he cannot be convicted of an attempt to steal, unless it appear that there was property in the pocket which might be stolen.

It should be left to the jury to say whether there was any property in the pocket. *Reg. v. Collins and others*, 497.

It was the course of business for a contractor who supplied the camp to send the meat to

the quartermaster-serjeant at the camp. The quartermaster-serjeant had his own weights and scales; he and a servant of the contractor weighed out the quantities for the messes, and a soldier attended from each mess, and took it away as weighed. The amount delivered was credited to the contractor, and the surplus meat taken away by the contractor's servant. The prisoner, the contractor's servant in charge of the meat, fraudulently put a false weight into the scale, and a complaint having been made that a mess was short weight, absconded when it was discovered. It was found that the quartermaster's weight had been removed, and the false weight substituted; that the weight of meat delivered was certain pounds short.

The jury found that the prisoner fraudulently substituted the weight with intent to cheat, intending to carry away and steal the difference between the just surplus for which he would have to account to his master, and the apparent surplus remaining after the false weighing, and that he would have carried it away if the fraud had not been detected :

Held, that the prisoner was properly convicted of an attempt to steal the meat, and also that the property in such meat was properly laid in the prisoner's master. *Reg. v. Edwin Cheeseman*, 100.

III. By Finding.

One who, in the expectation of a reward, withholds from the owner, whom he knows, a lost cheque received from the finder, is not guilty of stealing the cheque. *Reg. v. Edward Gardner*, 253.

IV. Generally.

A Court of Quarter Sessions has, by the 24 & 25 Vict., c. 96, s. 115, jurisdiction over the offence of larceny when committed upon the high seas, if the offender is apprehended within the jurisdiction of the Court of Quarter Sessions, as, e. g., where the offender and prosecutor were both fellow passengers in a vessel, and the larceny was committed on the high seas, between Madras and Point de Galle, and the offender was apprehended at Southampton and tried at the Southampton borough Quarter Sessions. *Reg. v. Peel*, 220.

A lady at a railway terminus, there being a great crowd at the pay place, and seeing the prisoner within the barrier and near that place, requested him to get her a ticket, which he consented to do. She then handed him a sovereign, but instead of getting the ticket he ran away with her money. It was found by the jury that he placed himself

commission of offence is cured by the 6 & 7 Vict. c. 83, s. 2.

It is not necessary that a coroner's jury should all be sworn at the same time, or all view the body at the same time, or that they should be sworn *super visum corporis*. *Reg. v. Ingham*, 508.

MUTINY ACT.

Homicide under, App. xxix.

NAVAL STORES.

Act for better protection of, App. xxii.

NEGLIGENCE.

The prisoner's unmarried daughter, aged eighteen, having for some time previously gone out to service, and occasionally returned to live with her mother and stepfather, at such times working at glove-making in order to earn her subsistence, was confined with child at her stepfather's house, and the prisoner, her mother, purposely neglected to procure a midwife or other proper person to attend her daughter when she was taken in labour, and by reason thereof she died in childbirth:

Held, that there was no legal duty on the prisoner to procure proper assistance under the circumstances, and therefore that she was not guilty of manslaughter. *Reg. v. Shepherd*, 123.

NIGHT POACHING.

On the trial of an indictment for night poaching, under the 9 Geo. 4, c. 69, ss. 4, 9, it is not sufficient to produce the warrant only under which the prisoners were apprehended, for the purpose of proving that the proceedings were commenced within twelve months of the commission of the offence, but the information in writing should also be produced. *Reg. v. Parker and Smith*, 475.

NUISANCE.

Obstructing highway by telegraph posts, 174.
Obstruction by street tramways, 180.

OATHS.

Act for relief of certain persons from, App. ix.

PARENT AND CHILD.

Neglect to provide medical assistance for daughter, 123.

PAROCHIAL ASSESSMENTS.

Act for regulating, App. xlvii.

PIGEONS.

By sect. 23 of the 24 & 25 Vict. c. 96 (*Larceny Act*), it is enacted that, whosoever shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, shall, on conviction, &c.:

Held, that this provision does not apply to a case where a party, under a claim of right, kills a pigeon which is doing mischief upon his land.

A., the occupier of land, gave notice to B., who kept pigeons, that such pigeons did damage to his land, and that he would destroy them if they were not restrained. After this notice, finding the pigeons on his land, he fired his gun, whereupon they rose; he then fired again and killed one of them, and being convicted upon an information laid under the above section:

Held, that such conviction was bad. *Taylor (app.) v. Newman (resp.)*, 314.

PERJURY.

On the hearing of the summons taken out by A., for an order of affiliation on H. of a bastard child born in March, A. was asked in cross-examination whether she had not had carnal connection with C. in the previous September. She denied it. The justices wrongly allowed C. to be called to contradict her, and he swore that he had connection with her in the September previous. C. was afterwards indicted and convicted for perjury in having sworn that in the September previous he had had connection with A.:

Held by eleven judges (Martin, B. and Crompton, J. *dubitantibus*), that although C.'s evidence was inadmissible in point of law, yet having been admitted and being relevant to the credit of a material witness in the cause, perjury could be assigned upon it. *Reg. v. Gibbons*, 105.

An illegitimate child being *filius nullius*, an indictment charging the defendant with taking a false oath before a surrogate and alleging that G. E. was the natural and lawful father of E. E. and that his consent was necessary as such father under the 4 Geo. 4 c. 76, cannot be sustained. *Reg. v. Fairlie*, 209.

An indictment alleged that the cause "came on to be heard and was duly tried by a jury:"

Held, sufficient, although no verdict given, the trial ending in a nonsuit. *Reg. v. Bray*, 218.

A feme sole obtained a judgment in the G. County Court, and then married S. She afterwards took out a judgment-summons in

her name when sole, in L. County Court, without having made her husband a party to the judgment. At the hearing of the summons the judge of the L. Court amended the summons by striking out the name of the plaintiff, and substituting S. and wife. After the alteration the defendant was sworn and examined, and committed perjury. He was then indicted and found guilty of perjury :

Held, that the amendment was without jurisdiction, and that there being no cause in the altered name, the conviction could not be supported. *Reg. v. Pearce*, 258.

An indictment for perjury in making a false declaration under 5 & 6 Will. 4, c. 62, s. 18, cannot be sustained when the deed or written instrument of which the declaration is confirmatory is not duly proved. *Reg. v. Cox*, 301.

To an indictment for perjury, on the hearing of an information before justices, under the 11 & 12 Vict. c. 49, for keeping open an inn for the sale of beer to persons not being travellers, before half-past twelve o'clock on Sunday afternoon, it was objected by counsel that the justices had no jurisdiction, and that the 11 & 12 Vict. c. 49, was repealed, and for this *Whiteley v. Heaton* (72 L. J. 217, M.C.) was cited :

Held, on the authority of *Harris v. Jenns* (3 L. T. Rep. N.S., 408), that the 11 & 12 Vict. c. 49, was not repealed, and therefore that the justices had jurisdiction. *Reg. v. Mary Senior*, 469.

On the trial of an indictment for perjury, alleged to have been committed on the trial of an indictment for an assault, all the evidence that was admissible on the trial of the indictment for the assault is admissible on the trial of the indictment for perjury. *Reg. v. Harrison*, 503.

PIRACY.

Extradition Act, 522.

POISON.

Act for regulating administration of, App. i.

POLICEMAN.

Arrest by—Assault—Warrant, 127.

POST OFFICE.

See LARCENY.

PUBLIC HOUSE.

Twenty-four prostitutes and fifty men remained at the bar of a public-house for an hour or more. The women were disorderly, and some of them swearing. At a later hour the same evening fifty prostitutes and sixty men were there, some of the prosti-

tutes being the same as were there at the earlier part of the evening. Several of the same prostitutes were proved to have been in the same house on other evenings. The defendant was present on these occasions :

Held, that this was sufficient evidence of knowingly permitting and suffering persons of notoriously bad character to assemble and meet together in the house, contrary to the Excise licence granted under 9 Geo. 4, c. 61 :

Held, also, that an information for such offence was a criminal proceeding, and that the defendant was not admissible as a witness upon the hearing of it. *Parker v. Green*, 169.

PLEADING.

On the trial of an information filed by the Attorney-General, charging the defendant with bribery at an election, the principal witness for the prosecution refused to answer certain questions, and was committed for contempt, and the judge discharged the jury without giving a verdict.

The defendant had pleaded not guilty, and he now desired to plead in addition the several matters which occurred at the trial :

Held, that he could not do so, as he would then be pleading double, but that the whole facts might be set out on the record, so that he might take any steps he might be advised in a court of error. *Reg. v. Charlesworth*, 40.

Where, in an indictment for perjury, the Attorney-General enters a *nolle prosequi* on the part of the Crown, he does so on his own responsibility, and this court will not interfere. *Reg. v. Allen*, 120.

The court refused to set aside on motion a plea of justification pleaded to counts of a criminal information for words spoken of and to a person acting magisterially, leaving the party to demur if he thought fit. *Reg. v. John Rea*, 401.

Venue in false pretences, 94.

Misjoinder of counts—Time for objecting, 201.

In criminal information—Plea of justification to counts for words spoken, 401.

Vexatious Indictments Act—Averment of performance of conditions, 483.

PRACTICE.

The prisoner was charged with uttering, &c., having been before convicted of felony. The old Act provided that the previous conviction should be proved first at the trial; the 24 & 25 Vict. c. 99, directs that the prisoner shall not be arraigned upon the

previous conviction till the subsequent felony shall have been disposed of. The 3rd section of the Repealing Act, 24 & 25 Vict. c. 95, considered as to proceedings at trial of offences committed before 1st November, 1861 :

Held, by the Recorder and the Common Serjeant, that the 3rd section of the Repealing Act directs that the proceedings at the trial of offences committed before 1st November, 1861, shall be in accordance with the rules observed till that time. *Reg. v. Montrion*, 27.

On the trial of an information filed by the Attorney-General under the Corrupt Practices Act, charging the defendant with bribery at a parliamentary election, the principal witness for the prosecution refused to answer certain questions, and was committed for contempt of court, and the judge discharged the jury without giving a verdict.

The court discharged a rule nisi calling on the Crown to show cause why judgment should not be entered for the defendant, and that he be dismissed and discharged from the premises and depart without any day, and why the award of jury process and all other proceedings for a second trial should not be stayed. *Reg. v. Charlesworth*, 44.

A judge is not bound to record a verdict which does not amount to guilty or not guilty, unless the jury request him to record it.

Upon an indictment for false pretences, the jury found the prisoner guilty of obtaining the property by the false pretences alleged, but added, that they thought he meant to pay for it.

The judge refused to receive such verdict, and told them they must find the prisoner guilty or not guilty, and left the facts again for their consideration :

Held, that a verdict of guilty which they then found was sustainable. *Reg. v. Meany*, 231.

The counsel for the prosecution opening no case against one prisoner, statements made by that prisoner not to be used except in a regular way of evidence. *Reg. v. Gardner and Humbler*, 332.

Counsel is not to state in his address to jury statements made by prisoner after his arrest. *Reg. v. Bodkin*, 404.

A court of quarter sessions has power to fine a barrister for contempt of court, even though committed by him in what he believes to be the legitimate exercise of his professional duty.

But if the court of quarter session fines for contempt of court without any reasonable ground, this court will interfere.

Counsel has a right to, and may with pro-

priety complain of the appearance of partiality on the part of any of the jurymen, but to do so in violent and abusive language, or in a violent manner and for the purpose of insult, and in a spite of admonition from the court, is a contempt. *Ex parte Pater*, 544.

Accessory after the fact, 242.

Misjoinder of counts—Time for objecting—Election, 261.

Statement for the prosecution in murder, 404.

Referring witness to his deposition, 409.

PRISONERS.

Act for aiding discharged, App. xviii.

Act for better instruction of, App. lvi.

QUEEN'S PRISON.

Act for regulating, App. ii.

REAL PROPERTY.

Act for facilitating proof of title to, App. xix.

RECEIVING.

The principal felon, during the prisoner's absence, left the stolen property with the prisoner's wife, who gave him sixpence on account. Afterwards the principal felon and the prisoner met and agreed on the price, and the prisoner paid the balance. Guilty knowledge as to the property having been stolen was inferred from the other circumstances of the case :

Held, that the receipt was not complete till the principal felon and the prisoner had agreed as to the price, and that the prisoner knowing then that the property was stolen, was properly convicted of feloniously receiving. *Reg. v. Woodward*, 95.

The prisoner lodged at the prosecutor's house about a year, and then left, but at what time and in what manner did not appear. On the next day the prosecutor's wife left with a small bundle. The articles mentioned in the indictment were then missed by the prosecutor, and were of too great bulk to have been contained in the bundle taken by the wife. Two days afterwards the prisoner was apprehended in company with the prosecutor's wife on board a vessel bound for Quebec, the wife passing by the prisoner's name ; and the missing articles being found part in the prisoner's cabin, and some on his person :

Held, that the prisoner could properly be convicted upon this evidence of feloniously receiving the articles, well knowing the same to have been feloniously stolen by a certain evil-disposed person. *Reg. v. Deer*, 225.

A husband and wife were jointly indicted for

stealing and receiving, and the jury found the wife guilty of stealing without any constraint on the husband's part, and the husband guilty of receiving the stolen property, knowing at the time when the property was delivered to him that it had been stolen by his wife :

Held, that the husband was properly convicted of receiving. *Reg. v. M'Athey*, 251.

REFRESHMENT HOUSES.

Knowingly suffering prostitutes to assemble at and continue in and upon the premises— Sufficiency of evidence to sustain conviction. *Belasco v. Hannant, Barton v. Hannant*, 203.

REGISTRATION OF BIRTH.

False statement to registrar of the birth of a child. *Reg. v. Hotine*, 146.

SHOOTING.

A person who fires a loaded pistol at a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and severely wounds one of the group, may be indicted and convicted for the felony of feloniously shooting and wounding the person injured with intent to do grievous bodily harm. *Reg. v. Fretwell*, 471.

SUICIDE.

Suicide is not murder within the 24 & 25 Vict. c. 100, ss. 11 and 15, and therefore attempting to commit suicide is a misdemeanor triable at quarter sessions. *Reg. v. Burgess*, 247.

THREATS.

Under the 24 & 25 Vict. c. 96, s. 45, which relates to demanding property, &c., with menaces or by force, the menaces must be of such a nature and extent as to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. It is a question for the jury whether the evidence in any particular case comes within that principle. *Reg. v. George Walton and Joseph Ogden*, 268.

In an indictment for concealing the finding of treasure trove from the Crown, it is not necessary to aver that the prisoner concealed it fraudulently. The words "unlawfully, wilfully and knowingly," are sufficient.

A., in ploughing, found large rings of old gold of considerable value and sold them for brass to B. for 5s. 6d., saying where he found them. B. afterwards found out that they were gold and offered them to a jeweller for sale as gold. Then B. said he had sold them

to C. for brass. Then B. and C. were at a bank together, depositing part of the proceeds for which C. had sold the gold rings :

Held, that there was evidence to support a conviction of both B. and C. for knowingly concealing treasure trove from the Crown. *Reg. v. Thomas and Willett*, 376.

TRADE UNIONS.

L., a member of a trade society, was told by members to leave off working for K., his master, he refused ; O'Neill, the president of the society, said that he, as president, ordered him to come out, and then abused L., and said, if he had been working at K.'s he would have pulled him out, and that he would use his influence to have him turned out of the society. Galbraith and others went to K.'s as a deputation, to point out to K. what they objected to. After this, L. was summoned by the society, O'Neill being in the chair, and the business was, whether L. was going to leave K.'s or to be turned out of the society. Galbraith reported to the meeting the result of the deputation to K.'s. L. was then asked by O'Neill whether he would leave K.'s or stay there and be despised by the society, and have his name sent round all over the country in the report, and be put to all sorts of unpleasantness :

Held, that this was evidence of a threat by O'Neill under 6 Geo. 4, c. 129, s. 3, and an endeavour to force L. to depart from his employment. *O'Neill and Galbraith (apps.) v. Longman (resp.)*, 360.

Attempting to force journeymen to leave their employ, 262, 366.

TRUSTEE.

Fraudulent—Express trust in writing—Savings bank, 189.

TURNPIKE TICKET.

Forgery of, 160.

UNIVERSITIES.

Act for taking votes at, App. viii.

VACCINATION.

Act to regulate, App. ix.

VAGRANCY.

An information under the 5 Geo. 4, c. 83, s. 4 (the Vagrant Act), charged the appellants with being found in the respondent's house at night "for an unlawful purpose, to wit, for the purpose of feloniously stealing the respondent's property." The evidence



